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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-476

ARLAM CARR, JR., *et al.*,

and

PENELOPE ANNE JENKINS, *et al.*,

Petitioners,

vs.

MONTGOMERY COUNTY BOARD OF EDUCATION, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on April 11, 1975, and June 27, 1975.

Opinions Below

The District Court opinion of May 22, 1974 is reported at 377 F.Supp. 1123 (M.D. Ala. 1974) and is printed in the appendix hereto,[1] App. 1a; the Court of Appeals opinion of April 11, 1975 affirming the District Court is reported at 511 F.2d 1374 (5th Cir. 1975) and is printed in

[1] The appendix to this petition is being printed separately pursuant to Rule 23.1(i) of this Court.

the appendix hereto, App. 44a; the Court of Appeals opinion of June 27, 1975 denying rehearing and rehearing *en banc* is reported at 511 F.2d 1390 (5th Cir. 1975) and is printed in the appendix hereto, App. 78a.

Jurisdiction

The judgment of the Court of Appeals was entered on April 11, 1975 (App. 44a). On June 27, 1975, the Court of Appeals denied application by petitioners herein for rehearing *en banc* (App. 78a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

On May 22, 1974, the District Court approved the implementation of a desegregation plan for Montgomery County, Alabama schools submitted to it by the Montgomery County Board of Education. The plan retains eleven virtually all-black elementary schools, enrolling approximately 57% of the system's black elementary school population, and leaves approximately 40% of the County's black junior high school students in virtually all-black facilities. It employs no conventional desegregation measures such as pairing or clustering whatsoever, relying instead upon neighborhood zoning and the assignment of black students previously enrolled in five virtually all-black elementary schools, closed under the plan, to predominantly white schools. No white children, only blacks, are transported under the plan for purposes of desegregation. Alternative plans submitted by petitioners which achieved greater desegregation than the Board's plan through reliance upon pairing and clustering were rejected by the district court based, in part, on its determination that white children would withdraw from the system if as-

signed to traditionally black schools. The district court was affirmed by the Court of Appeals for the Fifth Circuit on April 11, 1975. The questions presented here to this Court are as follows:

1. Do the decisions of the courts below conflict with this Court's decisions in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) and *Davis* v. *School Commissioners of Mobile County*, 402 U.S. 33 (1971) requiring that such techniques as pairing and clustering of non-contiguous school zones and other measures be resorted to where their utilization achieves the greatest possible degree of actual desegregation;

2. Do the decisions of the courts below conflict with this Court's decision in *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968) holding that apprehensions that white students might flee the system cannot justify the acceptance of a less than effective desegregation plan.

Constitutional Provisions Involved

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Statement of the Case

History of The Litigation

This school desegregation action was commenced on May 11, 1964 on behalf of the class of black children eligible to attend the public schools of Montgomery, Alabama.[2] On

[2] The history of petitioners' efforts to achieve a unitary system in Montgomery County, Alabama between the date suit was com-

August 18, 1972 petitioners filed a motion for further relief seeking greater desegregation, pursuant to this Court's decision in *Swann, supra,* in light of an enrollment report submitted by the Board to the district court which reflected the continued existence of numerous one-race schools within the Montgomery County system. On August 29, 1973, pursuant to the joint motion of petitioners and the Board, the district court entered an order approving the closing of a virtually all-black elementary school and assigning of its students to a predominantly white facility and the transferring of certain white students from a predominantly white junior high to a predominantly black facility and establishing a schedule for the submission of further suggestions for eliminating "such one-race schools as may be required by *Swann* v. *Charlotte-Mecklenburg Board of Education,* [citation in original omitted] . . .".

On September 7, 1973, a motion to intervene was filed by the American Friends Service Committee and thirty-four Montgomery students. Intervention was eventually granted as to the individual applicants, Jenkins et al (petitioners herein) by order of February 15, 1974.

Pursuant to the district court's orders of August 29, 1973 the Board submitted a desegregation proposal on January 15, 1974. This submission was initially modified on March 29, 1975. The proposed plan of petitioners Carr, et al., herein ("plaintiffs" in the trial court) was filed on

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menced in May, 1964 and June, 1970 is amply chronicled in reported opinions by the district court, Court of Appeals for the Fifth Circuit and by this Court. *Carr* v. *Montgomery County Bd. of Education,* 232 F.Supp. 705 (M.D. Ala. 1964); 253 F.Supp. 306 (1966); 289 F.Supp. 647 (1968), *aff'd,* 400 F.2d 1 (5th Cir. 1968), *aff'd, sub nom. United States* v. *Montgomery County Board of Education,* 395 U.S. 225 (1969); and 429 F.2d 382 (5th Cir. 1970). The United States was formally designated *amicus curiae* by the district court in July, 1964 and has played an active role in proceedings since that date.

February 16, 1974. Alternative plans were submitted by petitioners Jenkins, et al. herein ("plaintiffs-intervenors in the trial court) on April 1, 1974. After discovery depositions and evidentiary hearings conducted during April, 1974, the Board submitted further modifications of its proposed plan on May 8, 1974.

On May 22, 1974, the district court issued its opinion and judgment approving the Board's plan in its entirety for implementation commencing with the 1974-75 academic year. *Carr* v. *Montgomery County Board of Education,* 377 F.Supp. 1123 (M.D. Ala. 1974), App. 1a. On April 11, 1975, the Court of Appeals for the Fifth Circuit affirmed, *per curiam,* the district court's approval of the Board's plan "for the reasons set forth in its opinion"; one member of the panel, Judge Goldberg, dissented. *Carr* v. *Montgomery County Board of Education,* 511 F.2d 1374 (5th Cir. 1975), App. 44a. Rehearing and rehearing *en banc* were denied by the Court of Appeals on June 27, 1975, Judge Goldberg, joined by Circuit Judges Brown, Wisdom and Thornberry, dissenting. 511 F.2d 1390 (5th Cir. 1975), App. 78a.

The Montgomery County System

Montgomery is a consolidated city-county school system which in 1973-74 operated some 53 schools, including special facilities, enrolling approximately 36,016 students of which 17,042 (47%) were black and 18,974 (53%) were white. Thirty-six elementary schools enrolled 18,449 students (9,279 or 50% black); thirteen junior highs enrolled 9,644 students (4,390 or 45% black); and five high schools enrolled 7,923 students (3,373 or 43% black). Seven of these facilities were located in the County outside Montgomery City. The Board's Fall, 1973 report shows that the system had a variety of grade structures among its various buildings offering a regular instructional program:

30 Elementary schools serving grades 1-6

6 Elementary-Junior High Schools serving grades 1-9

7 Junior High Schools serving grades 7-9

4 Senior High Schools serving grades 10-12

1 Senior High School serving grades 7-12

The Montgomery County schools operated pursuant to a freedom of choice desegregation plan, in conformity with the requirements of *United States* v. *Jefferson County Board of Education*, 380 F.2d 385 (5th Cir. 1967) *en banc*, *cert. denied*, 389 U.S. 840 (1967), during the academic years 1967-68, 1968-69 and 1969-70. In August, 1969 the district court observed that three years of free choice had failed to eradicate the duality of the Montgomery County school system and that other means would have to be found to achieve further desegregation. Of some 68 schools operated at all grade levels at that time, four enrolled only white students and 26 had all-black enrollments. The district court's order of February 24, 1968 pointed out that, out of a school population of approximately 15,000 blacks and 52,000 whites, only 550 blacks and no whites were attending schools enrolling children predominantly of the opposite race under freedom of choice. 289 F.Supp. 647, 649-50.

In 1970, the district court approved a Board desegregation proposal which, as modified in minor detail in 1972 and 1973, assigned students to schools in basically two ways: within the city limits of Montgomery, a geographic zone was established for each school, and students residing within that zone attended the school, except for majority-to-minority transferees. (See, 429 F.2d 382, at 386); outside Montgomery City, students fell within loosely defined "periphery" zones, except for students in extreme southern Montgomery County. Almost all students in "periphery"

zones were transported to school by bus, and most were assigned to schools in the city. In no instance was pairing and clustering, of either contiguous or non-contiguous schools of opposite racial composition, resorted to under the approved Board plan.

In 1973-74, these assignment techniques resulted in the continued maintenance of many racially-identifiable schools. Fifteen of thirty-six elementary schools were 87% or more black; seven of thirteen junior high schools were 85% or more black; and two senior high schools were more than 85% black.

1974 Desegregation Proposals

The district court had three desegregation proposals before it, one prepared by the Board, one submitted by petitioners Carr, et al. (referred to as "plaintiffs' plan" in the opinions below) and one, containing several variations, offered by petitioners Jenkins, et al. (referred to as "plaintiffs-intervenors" plan).

The Board's plan relied upon satellite zoning of black students primarily, reassignment of "periphery" pupils, rezoning, and black school closings, but eschewed any reciprocal transportation of white students to black schools, pairing or clustering. It projected that almost 60% of Montgomery County's elementary students would remain in eleven disproportionately and indentifiably black facilities and that two junior high schools over 70% black would be retained. More specifically, the Board plan proposed closing five previously virtually all-black elementary schools and assigning some of the students from those schools to predominantly white schools and reassigning approximately 400 black students at another virtually all-black school to predominantly white schools. No white elementary school students were to be reassigned to a

school that would remain predominantly black. Consequently, 55% of the black elementary school population was to be enrolled in facilities 87% or more black; 44% of them was scheduled to attend elementary school 93% or more black.

The plan of Petitioners Carr, et al. ("plaintiffs") was prepared by Dr. Gordon Foster, Director of the Florida School Desegregation Center. Dr. Foster's plan was based upon the flexible guideline that racially unidentifiable schools in Montgomery should not, in general, vary more than 15% above or below the system-wide population, although he made "no attempt to press the schools within that mold." [3] His plan dealt only with Montgomery City schools. Dr. Foster prepared a plan based upon the board's 1973-74 zones which fully desegregated all city schools through the use, at the elementary level, of pairing and clustering, with some modification of the zones, primarily through reassignment of "periphery" students. Dr. Foster proposed desegregation of all secondary schools within the city using the same basic techniques as the school board: closing one black junior high, rezoning, and reassigning transported students from the periphery area. Under his plan, elementary schools would have had a 1-3 or 4-6 structure; capacities did require deviation, however, in two pairings, where the division of grades was 1-2, 3-6 and 1-4, 5-6, respectively. Dr. Foster's plan would have also required an increase in the number of pupils being transported in this system, although the times and distances of travel would have been no greater than those for many

[3] In so doing, Dr. Foster acted in the spirit of this Court's holding in *Swann*, *supra*, at 25, that "Awareness of the racial composition of the whole school system is likely to be a useful starting point in shaping a remedy to correct past constitutional violations."

students bused in the south county, in "periphery" areas or to be reassigned across the city under the Board's plan.

The plan of petitioners Jenkins, et al., ("plaintiffs-intervenors") was devised by Dr. Larry Winecoff, former Director of the South Carolina School Desegregation Center. Dr. Winecoff first sought to achieve the maximum desegregation feasible through alteration of attendance zones in a contiguous fashion, within the school board's walking-distance regulations (a 2½ mile radius from any school). He also made use of the existing "periphery" transportation zones. This contiguous rezoning took the form of "strip zones" across the city from east to west, or northwest to southeast. In order to achieve any substantial desegregation at the elementary level with this technique, Dr. Winecoff restructured elementary schools into primary (1-3) and intermediate (4-6) school centers.

He further determined, however, that even with this grade restructuring and alteration of zone lines, 14 elementary schools would remain racially identifiable. He therefore, pursued means of increasing the degree of desegregation at the elementary level, selecting the method of creating satellite, cross-busing sub-zones between certain of the grade 1-3 zones he had drawn. Winecoff's "Plan A", therefore, consisted of the following components: new zone lines and proposals for some cross-transportation, using satellite zones, at grades 1-3; new zone lines at grades 4-6; new zone lines at grades 7-9; and new zone lines for the senior high schools, grades 10-12.

Like Dr. Foster's plan, Plan A required transportation of additional students by the Montgomery County system. But, the distances to be travelled under Dr. Winecoff's plan were well related to those traversed by "periphery area" buses carrying Montgomery County students under the Board's 1970 desegregation plan.

The District Court Opinion

The district court's May 22, 1974 approval of the Board desegregation plan for implementation at the commencement of the 1974-75 academic year, App. 1a., was avowedly premised upon its view that such an arrangement satisfied the tests for the establishment of a unitary system articulated by the Court of Appeals for the Fifth Circuit in *Ellis* v. *Board of Public Instruction of Orange County*, 423 F.2d 203 (5th Cir. 1970), App. 25a. There, the Court of Appeals held that a neighborhood assignment plan, under which an elementary school student normally attended the school nearest his home, could pass constitutional muster if it observed a strict proximity rule (ignoring man-made or natural boundaries) and was effective to establish a unitary system. *Ellis, supra* at 207-208. While acknowledging that the Board's plan did not comply strictly with *Ellis'* requirements, the district court observed that the "principle" of that decision was respected, and that, where a school district's desegregation process remained under "judicial scrutiny", such deviations could not be regarded as constitutionally fatal, App. 28-29a. The schools left to serve virtually all-black enrollments under the Board's plan were, according to the district court, "the result of residential patterns and not of the school board's action—either past or present", App. 18a. It remarked approvingly that most of the black children assigned to racially identifiable elementary schools could look forward to attending substantially desegregated junior and senior high school facilities, App. 18a. In defending its preference for the Board's plan over those submitted by petitioners, the district court asserted that the latter plans proposed the establishment of fixed racial quotas for the student population in each school, an approach contrary to prevailing doctrines, as it understood them, and reliance upon satel-

lite zoning, clustering and pairing techniques that would have a disruptive influence upon the system, *infra*, p. 16a. In any event, such approaches would, in the court's view, require cross-city busing which would increase the time and distances students would have to travel and still not "accomplish any effective or realistically stable desegregation", App. 18a. The district court continued in effect existing majority-to-minority provisions and appointed a biracial committee to assist the Board in achieving further desegregation, *infra*, pp. 33, 35-37a.

The Court of Appeals Opinion

In a *per curiam* opinion of April 11, 1975, the Court of Appeals for the Fifth Circuit affirmed the district court judgment in its entirety, App. 44a. Pointing to "reasons set forth" in the lower court's opinion as justifying its action, the Court of Appeals concluded its terse opinion by remarking that it had taken note of the "history of this litigation" and that the system had been and would continue to be under close judicial scrutiny insofar as desegregation was concerned, App. 44a. In the lengthy and scholarly dissent, App. 46a, one member of the panel, Judge Goldberg, set forth an analysis of how the district court's opinion diverged significantly from school desegregation principles established by this Court and his own Circuit, concluding that "the district court erred in adopting the School Board plan, because that plan falls short of the constitutional mark, and because there is no indication of the unworkability of a constitutional remedy." App. 47a.

Reasons for Granting the Writ

A. The Decisions of the Courts Below Approving a Desegregation Plan Which Leaves Significant Numbers of Black Children In One-Race Schools Conflict with Controlling Decisions of This Court.

In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) and *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33 (1971), this Court made clear that, in school systems previously segregated by race pursuant to state law, the continued existence of one-race schools should be regarded as a vestige of this prior unconstitutional discrimination, not the consequence of adventitious demographic change. Any attempts to dismantle such dual systems, these decisions teach, may not rely upon approaches, including so-called neighborhood assignment plans, that would perpetuate the effects of past segregative practices. Instead, where necessary "to achieve the greatest possible degree of actual desegregation," such districts should resort to a variety of school assignment practices such as reasonable pairing, clustering and transportation.

The district court in this litigation, effectively disregarded these now-familiar doctrines by ordering the implementation of a "neighborhood assignment plan" for the Montgomery County, Alabama school system which projected the assignment of almost 60% of the system's black elementary students to eleven schools more than 80% black. Pairing, clustering and additional transportation of students were found by the district court to be "impracticable" and unnecessary since the remaining virtually all-black schools were the result of residential patterns completely unaffected by Board conduct, past or

present.[4] This was so, held the district court, despite the judicial record it established as to the existence of a totally segregated system in Montgomery in 1964 and of overt segregative acts by the Board as late as 1968. Petitioners respectfully submit that if a district court, with appellate court approval, can condone the continued isolation of large numbers of black children in segregated schools in a system which has had such a recent history of discriminatory practices as does Montgomery County, Alabama on the ground that the result is dictated by residential patterns, this Court's decisions offer little realistic promise of achieving equal education. The district court by adopting the *Ellis* v. *Board of Public Instruction of Orange County,* 423 F.2d 203 (5th Cir. 1970) neighborhood assignment plan as the standard against which the Board's proposal should be measured, in effect revived an approach to desegregation explicitly rejected in *Swann* and *Davis.* The Court of Appeals, by affirming the lower court and refusing *en banc* rehearing, has left standing a decision that conflicts with many of its own decisions subsequent to *Swann,* including a subsequent order requiring desegregation beyond that achieved through neighborhood assignments in the very case upon which the district court placed such great reliance. See *Ellis* v. *Board of Public Instruction of Orange County,* 465 F.2d 878 (5th Cir. 1972),

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[4] The district court's approach violates not only *Swann* and *Davis,* but *Green* v. *County School Board of New Kent County,* 391 U.S. 430 (1968) which dictated that only plans promising "realistically to work", and "realistically to work *now*", should be approved and that a school board would have a heavy burden to justify "its preference for an apparently less effective method" at 4399, in the face of more promising alternatives. Here the Board did not offer, nor did the district court require, any explanation, other than generalized objections to pairing and clustering, for its limited proposal. See Judge Goldberg's remarks in this regard, App. 63a-65a.

cert. denied, 410 U.S. 966 (1973). In so doing, the Court of Appeals, after years of faithful adherence to the principles of *Swann,* has decided to encourage trial courts in its circuit to evaluate desegregation plans according to standards it followed prior to *Swann* and *Davis.*

No more effective indictment can be found of the district court's determination that the eleven remaining virtually all-black schools were the consequence of residential patterns, we submit, than the record made by that very court since this school desegregation case was filed in May, 1964. It duly catalogues the variety and persistence of Board actions to create, maintain and perpetuate the racially dual system in Montgomery County, Alabama.

In its July 31, 1964 order, the district court found that:

1. through policy, custom and practice, the Montgomery County Board of Education, operated a dual system based upon race and color. 232 F.Supp. 705, at 707;

2. teachers were assigned according to race. *Id.,* at 707;

3. there were schools designated for and solely attended by white students that were in closer proximity to the homes of black students than were the schools designated for the black students. *Id.,* at 707;

4. students using the transportation facilities—school buses—were segregated according to race and transportation was furnished by the defendants for blacks only to schools attended solely by black students and for white students only to schools attended solely by white students. *Id.,* at 707;

5. the "feeder system" had been set up, was based, and was presently operating on distinctions of race and color. *Id.*, at 707;

6. strong considerations of race had figured in the disbursement of school funds for maintenance, operation and construction in the Montgomery County school system. *Id.*, at 708;

7. the Montgomery County Board of Education had made and was presently making assignments and transfers of students on the basis of race notwithstanding the provisions of the Alabama Placement Law. *Id.*, at 709.

As the district court remarked in a later opinion with respect to the status of desegregation in Montgomery County prior to 1964:

> From 1954—when the Supreme Court of the United States put the Montgomery County School Board and other school boards throughout this country on notice that they could not continue under the law to operate a dual school based on color—until this Court found it necessary to enter an order on July 13, 1964, requiring commencement of the desegregation of public schools in Montgomery County, Alabama, the Montgomery County, Board of Education had taken no steps and had made no plans whatsoever to comply with the law of this land in the area of school desegregation. 289 F.Supp. 647, at 657.

In its order of February 24, 1968, the district court found that:

1. the defendants through their agents—the principals and coaching staffs—had adopted a policy of scheduling interscholastic athletic contests for its

traditionally white schools only with other traditionally white schools, and for its traditionally black schools, only with other traditionally black schools and that this manner of operating the athletic program had and continued to have the effect of influencing the choice of students within the system. 289 F.Supp. 647, at 651;

2. the defendants had continued to construct new schools and expand some existing schools [and that] the construction of new schools with proposed limited capacities geared to the estimated white community needs and located in predominantly white neighborhoods and the expansion of the existing schools located in predominantly black neighborhoods had violated both the spirit and the letter of the desegregation plan for the Montgomery County School System. *Id.*, at 651;

3. the defendants had failed to eliminate the bus routes where there existed overlapping and duplication based upon race. *Id.*, at 651;

4. the defendants could not justify nor excuse any further delay [in the area of desegregation of facilities and staffs] upon the ground that some of the teachers were reluctant to teach in the schools predominantly of the opposite race. *Id.*, at 653; and

5. unless the "freedom of choice" plan were more effectively and less dilatorily used by the defendants in this case, the court would have no alternative except to order some other plan used. *Id.*, at 653.

And, by August, 1969, the district court had concluded that the freedom-of-choice plan in effect since 1967, had not been successful in disestablishing the dual system and

offered no realistic promise of being effective in the reasonably near future. 429 F.2d 382, 384 (5th Cir. 1970).

Contrary to the district court's contentions, most of the eleven virtually all-black elementary facilities left under the plan it approved for the 1974-75 academic year perpetuate the discriminatory practices previously designed to maintain a racially-dual system. As the following chart demonstrates, eight of eleven schools were all-black in 1967-68 (when the court found the Board actively engaged in segregation), remained all-black or virtually all-black through 1968-69, (when the court found that freedom-of-choice was a failure) up to 1973-74 (during the operation of the Board's desegregation proposal initiated in 1970) and were projected to remain all-black by the Board under its plan for 1974-75:

Black Enrollment Ratios

School Name	*1967-68*	*1968-69*	*1973-74*	*1974-75 (Projection in Board's plan)*
Booker T. Washington	100	100	98	98
Carver	100	100	99	99
Daisy Lawrence	100	100	98	98
Dunbar	100	100	87	87
Fews	100	100	99	99
Hayneville Road	100	100	96	95
Loveless	100	100	100	99
Paterson	100	100	94	94[5]

[5] Appendix A to Judge Goldberg's dissent, App. 76a establishes that the Board's predictions of black enrollments for these schools were generally accurate except in the case of three schools where actual black enrollments for fall 1974 exceeded projections: Dunbar (91% black); Fews (100% black) and Hayneville Road (97% black); and his Appendix B points out that two junior high schools scheduled to enroll significant numbers of whites were actually substantially black for 1974-75: Badwin Jr. (73% black projection; 85% black enrollment) and Bellingrath (62% black projection; 81% black enrollment).

Thus, these schools were established before any desegregation, they have always been black schools, and will continue to be unless an effective plan is implemented. Moreover, it is interesting to note that Carver High School (located on the same site as Carver Elementary) and Hayneville Road Elementary were cited by the district court in its February 24, 1968 opinion as examples of facilities that had been expanded by the Board to perpetuate segregation. 289 F.Supp. 647, 651.

This Court observed in *Swann,* that school board policies with respect to expansion, construction, closing and location of school facilities may promote segregated residential patterns:

> People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.
>
> In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown,* closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.' Such a policy does more than simply influence the

> short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with "neighborhood zoning," further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy. 402 U.S. 1, at 20-21.

More recently, this Court in *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973), pointed out similarly that:

> the use of mobile classrooms, the drafting of transfer policies, the transportation of students, and the assignment of facility and staff on racially identifiable bases, have the clear effect of earmarking schools according to their racial composition, and this, in turn, together with the elements of student assignment and school construction, may have a profound reciprocal effect on the racial composition of residential neighborhoods within a metropolitan area, thereby causing further facial concentration within the schools. *Id.* at 202.

These characterizations aptly describe the extent to which Board policies created and maintained one-race schools in Montgomery County, Alabama. *Swann, supra*, clearly dictates that one-race schools created by Board action must be desegregated:

> . . . In a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contem-

> plates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely non-discriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part. 402 U.S. 1, at 26.

Pairings and groupings of non-contiguous zones may be resorted to even where "administratively awkward, inconvenient and even bizarre" during the interim period designed to eliminate the dual system, in view of the fact that assigning children to schools nearest their homes may not serve to dismantle a system deliberately constructed to enforce racial segregation. 402 U.S. 1, 28.

The district court, heedless of this Court's conclusion in *Swann* and *Keyes* that such schools must be regarded as perpetuations of school board segregative policies and, hence, disestablished, held that eleven virtually all-black schools need not be desegregated since they arose as a result of residential patterns. It based its conclusion not upon any evidence but rather as implicitly true because "the population of Montgomery is so arranged that whites largely live on the east side of the city and blacks on the west" App. 16a. Certainly, if the district court's conclusion that Montgomery County, Alabama one-race schools are the products of segregated residential patterns which its Board had no hand in creating, then any other school system previously segregated by law should have no difficulty satisfying the same standard. It is squarely contrary to this Court's decision in *Davis, supra,* where the existence of residential segregation in Mobile was rejected as a justification for the school board's failure to desegregate its

all-black schools. 402 U.S. 33, 36. Nothing could more effectively assure success to those boards which have been fighting since 1954 to avoid implementing *Brown, supra* than leaving the district court ruling undisturbed.

B. The Decisions of the Courts Below Approving An Ineffective Desegregation Plan Which Unequally Burdens Black Children In Order to Reduce The Likelihood of White Flight Conflict With Controlling Decisions of This Court.

This Court's decisions in *Brown II*, 349 U.S. 294, 300 (1955), *Cooper* v. *Aaron*, 358 U.S. 1 (1958) and *Monroe* v. *Board of Commissioners*, 391 U.S. 450, 459 (1968) establish that no more basic error can be committed in efforts to achieve desegregation than to yield to community opposition. In *Monroe*, this Court stated:

> Respondent's argument in this Court reveals its purpose. We are frankly told in the Brief that without the transfer option it is apprehended that white students will flee the school system altogether. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them. *Brown II*, at 300, 99 L.Ed. at 1106. 391 U.S. 450, at 459.

Here, the district court violated this principle.

To the extent that the approved plan achieves any meaningful desegregation, it does so in a fashion that unduly burdens black children and their parents. Under the Board's proposal, five previously all-black schools are the only facilities closed; only black children are assigned to elementary schools enrolling predominantly students of the opposite race; and only blacks are transported for desegregation. The Board's plan imposed this unequal burden upon blacks and the district court approved such

provisions to reduce the level of white opposition to desegregation and discourage "white flight." Hence, the district court concluded that satellite zoning and cross-city busing of white students to desegregate further the remaining virtually all-black schools would not accomplish "stable desegregation" and should, therefore, be dismissed as viable alternative techniques to neighborhood zoning. App. 18a. In so doing, that court improperly rejected constitutionally-acceptable and effective techniques for achieving meaningful desegregation simply because of apprehension that white citizens of Montgomery County, Alabama would find them intolerable.[6]

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[6] As Judge Goldberg indicates in his dissent, in this regard:

> the district court was persuaded by the school Board's attempt to demonstrate that busing of white children into black neighborhoods to attend traditionally black schools would in many cases be met with withdrawal of white students from those schools *Infra,* p. 64a.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-476

ARLAM CARR, JR., ET AL

AND

PENELOPE ANNE JENKINS, ET AL

PETITIONERS,

VS.

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

In the "Questions Presented" portion of their brief the petitioners misstate and give an incomplete account of the factual finding concurred in by the two courts below. The petitioners thereby fail to present the applicable constitutional questions in the factual context of this case. When the actual factual findings of the District Court, as affirmed by the Court of Appeals, are considered, the real questions presented are as follows:

1. DID THE COURTS BELOW ERR IN THEIR APPROVAL OF A SCHOOL DESEGREGATION PLAN WHICH INCLUDES SOME

SUBSTANTIALLY PREDOMINANTLY BLACK SCHOOLS UPON THE EXPRESS FACTUAL FINDING BY THE DISTRICT COURT, CONCURRED IN BY THE COURT OF APPEALS, THAT: "IN EACH INSTANCE THIS COURT HAS EXAMINED AND REEXAMINED THE EVIDENCE AND HAS DETERMINED THAT THESE PREDOMINANTLY BLACK SCHOOLS EXIST AND CONTINUE TO EXIST WITHOUT ANY DISCRIMINATORY BOARD ACTION" 377 F. Supp. at 1135 AND UPON THE EXPRESS FACTUAL FINDING THAT "AN IN-DEPTH ANALYSIS OF THE SCHOOL BOARD'S PLAN IMPRESSES THIS COURT THAT THE CONTINUED EXISTENCE OF SOME SUBSTANTIALLY PREDOMINANTLY BLACK SCHOOLS IS GENUINELY NONDISCRIMINATORY". 377 F. Supp. at 1132

2. DID THE COURT OF APPEALS ERR IN AFFIRMING THE APPROVAL BY THE DISTRICT COURT OF A SCHOOL DESEGREGATION PLAN UPON AN IN-DEPTH EVALUATION OF THE REALISTIC EFFECTIVENESS OF THE PLAN TAKING INTO ACCOUNT THE PRACTICALITIES OF THE SITUATION? 377 F. Supp. at 1135

THE MONTGOMERY COUNTY SCHOOL SYSTEM

This school system is a unified city-county system including the urban area of the City of Montgomery

as well as the rural areas of the entire county. The system is composed of 54 schools which operate on a six-three-three grade structure. There are 36 elementary schools (grades 1 through 6); 14 junior high schools (grades 7 through 9)[1] (the 14 junior high schools include the facility at Montgomery County High School which was paired in 1970 with the Dunbar facility) and 5 high schools (grades 10 through 12) including the Montgomery County facility in the extreme southern part of the county rural area). There are 35,916 students presently in the system consisting of 17,942 black and 18,874 white students. (March 1974 Report to the District Court) The racial ratio of students is approximately 47.5% black and 52.5% white.[2]

CASE HISTORY OF DILIGENT AND GOOD FAITH IMPLEMENTATION OF GOVERNING CONSTITUTIONAL PRINCIPLES

This school desegregation case was originally commenced on May 11, 1964, as a class action brought by

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[1]There are some combined 1-9 facilities in the system, i.e., Loveless, McIntyre, Georgia Washington, Hayneville Road, Bellingrath and Floyd. They have separate administrations, principals and facilities although they have the same name designation and occupy the same site. The same is true for the Carver complex. The 1-9 facility at Hayneville Road, Georgia Washington, McIntyre and Loveless are consolidated under the Board plan to the 1-6 and 7-9 grade structure.

[2]In 1970 there were 57 schools—38 elementary (Pine Level and Billingslea have been closed); 14 junior high schools and 5 senior high schools. There were approximately 17,175 black students and 22,566 white students in the system in 1970 with the racial ratio of approximately 43% black and 57% white. (1969 Report to the Court)

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black children through their parents. (Original Record, Case No. 25865, p. 1) The United States of America was appointed amicus curiae by order of the District Court dated May 18, 1964, and has served as such during the course of the case. Throughout the course of the progressive desegregation proceedings, every Court reviewing the implementation measures of the board and the case history has complimented the Montgomery County School Board on its efforts toward achieving a unitary system.

The District Court has issued several orders and supplemental directives as desegregation of the system progressed pursuant to the initial order of the Court. The record in these proceedings reflects and is evidence of continuous good faith effort on the part of this Board in accomplishing the necessary but difficult task of achieving a unitary school system in which racial discrimination is eliminated root and branch.

One of the first of the supplemental orders of the District Court was to approve the initial student desegregation for the 1964-65 school year. In this order dated September 5, 1964, in noting such approval, the Court made the following comment at this early and critical stage of the now successfully concluded transition period:

> The Court now specifically finds and concludes that in the case of each of the applicants (black children applying for attendance in predominantly white schools) whether the application was granted or denied, the action of the Montgomery County School authorities constituted a good faith implementation of the governing constitutional principles and a good

faith compliance with the orders of this Court. (Original Record p. 150; 9 Race Rel. L. Rep. 1175)

On May 5, 1965, the District Court stated from the bench:

> Let me say this; that I recognize the problems that exist in this particular school district, and I think the plaintiffs recognize them, and both parties in this lawsuit have, up to this point, demonstrated to me an awareness of their responsibilities not only to their clients, but to the school system, and I want to congratulate and compliment both the plaintiffs and particularly the school board, Montgomery County School Board, for its efforts as demonstrated last fall, in complying with the law as that law was reflected in the Order of this Court. (Original Record p. 445)

On August 27, 1965, the District Court stated:

> From the evidence in this case and from the history of this case as known by the Court, the defendant Board and Superintendent have complied with and are continuing to comply with the applicable law as decreed by this Court on July 31, 1964.
> (Original Record p. 234)

On May 25, 1967, the District Court stated:

> I would like to say this to you here in the presence of the plaintiffs' and the Government lawyers; that I am impressed that the Montgomery County Superintendent of Education and members of the Montgomery County School Board of Education now evidence and have in the past evidenced a desire and intent to operate a school system here in Montgomery

> County as professional educators and not as politicians. This present attitude is demonstrated here at this time; this past conduct on the part of these officials has, without any doubt inured to the benefit of the students regardless of their race, in Montgomery County that seek quality education. And I have observed and I have been impressed that these officials have accomplished this largely through—or this has been accomplished largely through their efforts and without any serious discord or disruption as far as any school is concerned. This, when it is compared with some other similar operations, is a considerable feat, for which this community, in my judgment, owes these school officials their appreciation. It evidences a pattern of professional conduct that other systems could, for the benefit of their students, emulate. (Original Record p. 448-449; 400 F. 2d 1, at p. 3)

On September 5, 1967, the District Court stated from the bench:

> You are dealing here with a school system that you haven't had to take to your appellate courts a single time since you started. It is the only major school system in the state that you haven't had to do it on; that they have done what they have done in good faith, and they have been ahead of most of your other systems in every field. (400 F. 2d 1, at p. 3-4)

Upon conclusion of a hearing on August 15, 1969, the District Court stated from the bench:

> Let's talk about where you are going next year. You all have read these appellate court decisions the same

as I have. The other two large school systems in our state have gone to assignment and zoning and pairing this year by reason of appellate court mandates. You know I am talking about Mobile and Jefferson. This is the only metropolitan large school district in the state that hasn't gone to a zoning and pairing already. *I can say that a part of this is due to the "I think, good faith effort on the part of this board to do what this court felt it necessary to require them or order them to do."* It's due in part to the fact that I think that the court viewed the situation realistically and through it was necessary to go ahead and get started on the job that we had to do. I believe all of this is going to make the terminal year, which is next year insofar as the dual system is concerned, a little less—a little less disrupting and disturbing to your school system than it is on the other larger school systems—and it would probably be on some of your smaller school systems, which is ordered for next year. (Emphasis supplied) (Original Record p. 346-353)

The Court of Appeals on August 1, 1968, in reviewing the District Court faculty directives noted the public recognition given by the District Court to the good faith efforts by this Board. (400 F. 2d 1, at p. 2-3)

The educational experts from the Office of Education acknowledged in their 1970 plan that this Board had made "significant progress" in the desegregation process. (HEW plan, p. 3)

The Supreme Court of the United States, through Mr. Justice Black, in upholding the specific faculty

measures directed by the District Court, concluded its opinion on June 2, 1969 with the following language:

> It is good to be able to decide a case with the feelings we have about this one. The differences between the parties are exceedingly narrow. Respondents, members of the Montgomery County School Board, state clearly in their brief, "These respondents recognize their affirmative responsibility to provide a desegregated, unitary and nonracial school system. These respondents recognize their responsibility to assign teachers without regard to race so that schools throughout the system are not racially identifiable by their faculties. . ." Brief for Respondents 11-12. Petitioners, on the other hand, do not argue for precisely equal ratios in every single school under all circumstances. As the United States, petitioner in No. 798, recognizes in its brief, the District Court's order "is designed as a remedy for past racial assignment . . . We do not, in other words, argue here that racially balanced faculties are constitutionally or legally required." Brief for the United States 13. In short, the Montgomery County school board, and its counsel, assert their purpose to bring about a racially integrated school system as early as practicable in good-faith obedience of this Court's decisions. Both the District Judge and the Court of Appeals have accorded to the parties and their counsel courteous and patient consideration; there is no sign of lack of interest in the cause of either of the courts below. Despite the fact that the individual petitioners in this litigation have with some reason argued that Judge Johnson should have gone farther to protect their rights than he did, we approve his order as he wrote

> it. This, we believe, is the best course we can take in the interest of the petitioners and the public school system of Alabama. *United States v. Montgomery County Board of Education,* 395 U. S. 225, at 236, June 2, 1969.

The Supreme Court of the United States throughout the above opinion, specifically recognized the thorough understanding that the District Court had of the Montgomery County school system. *United States v. Montgomery County Board of Education,* supra.

In the June 29, 1970 affirmance of the District Court's approval of the Board plan, the Court of Appeals significantly stated:

> If more district courts and more school boards had been as sensitive as those here involved to the requirements of the law, the path to the goal of school desegregation in this circuit would have been infinitely smoother than it has been. 429 F. 2d 382, 387 (5 Cir. 1970)

When the 1970 plan was implemented in September of 1970 not as many white children as projected were in attendance at some formerly black schools. The District Court requested an investigation be made by the United States. Upon submission of the investigation as conducted by the United States Department of Justice, Federal Bureau of Investigation, the District Court stated by letter to the United States with copies to all parties:

> From this report, particularly the explanations for the several variances that I noted in my letter as made by the Montgomery County school authorities,

> it appears that the Montgomery County school officials have done and continue to do all that can reasonably be expected of them in order to implement, in good faith, the desegregation plan of this Court. There is no indication that any Montgomery County school officials—and this includes principals and teachers—have done anything concerning the implementation of the order except to make good faith efforts to make the plan that was filed by the Montgomery County School Board and adopted by this Court work effectively. (R. 1938-1941 and Defendant's Exhibit 3 to April 24-25, 1974 hearing)

On August 14, 1972 the United States in responding without objection to the motion of the Board for enrollment changes, stated:

> The student enrollment figures and the stability of the system in the past two years indicate that a unitary school system is being established in Montgomery County.

In the May 22, 1974 order of the District Court the following observation is made:

> This fact [only one appeal filed by school board] is significant in that it underscores the efforts of the Montgomery Board to comply with the law as reflected by the mandates of this Court. Unlike many school boards that opposed desegregation at every step, the Montgomery County Board of Education recognized that it had an affirmative duty to desegregate its school system. As the Fifth Circuit noted on appeal, "good faith conduct on the part of

> any litigant in any court, especially in a court of equity and more particularly, in the sensitive area of desegregation, is a vital element for appropriate consideration". (377 F. Supp. at p. 1126 Note 9)

> Second, all the parties to this litigation share the same goal: establishment of a "desegregated unitary and nonracial school system". Every court that has reviewed the record of this litigation has observed that the differences between the parties have been unusually small. Moreover, the Montgomery County School Board has been repeatedly complimented for its good faith efforts to comply with the requirements of the law. It is worthy of pride that the ten-year history of this case has been characterized throughout by cooperation from all the participants. (377 F. Supp. at 1127-1128)

In the May, 1974 opinion the District Court additionally and specifically stated:

> Since the implementation of the 1970 plan, the evidence in this case reflects that the school board has attempted in good faith to ensure its effective operation.
> (District Court Opinion—377 F. Supp. at p. 1131)

On May 22, 1974 the District Court very significantly finds from the evidence and concludes:

> The school authorities in the Montgomery school system have taken affirmative action to the extent required by the law and have achieved the greatest possible degree of actual desegregation, taking into account the "practicalities of the situation". (377 F. Supp. at 1123)

On April 11, 1975 the Court of Appeals observed in affirming the order of the District Court, which the Petitioners here seek to review:

> "We take note of the history of this litigation as reflected by the opinion of the district court, this court and the Supreme Court, cited in the district court's Opinion" 511 F. 2d 1374.

The single dissent of the Court of Appeals significantly concedes:

> "I am confident that our respected, scholarly, and courageous trial judge did not hesitate to apply the law correctly as he saw it to the facts before him in Montgomery". 511 F. 2d at 1387.

STATEMENT OF THE CASE

Procedural Background of Current Litigation

During the school years 1970-71 and 1971-72, the Montgomery County School system operated pursuant to a Court approved desegregation plan which was prepared essentially by government educational experts with some minor changes and refinements (377 F. Supp. at 1226)

On Appeal, the Fifth Circuit affirmed the District Court's decision to implement this plan. *Carr vs. Montgomery County Board of Education,* 429 F. 2d 382 (5 Cir.) 1970.

The 1970 plan included proposals to close certain schools, to change transportation routes, to pair several schools and to establish attendance areas. (377 F. Supp. 1226) These techniques resulted in actual student desegregation in every school in the Montgomery System

except one which the Court of Appeals found to be a facility located so deep in the heart of a black residential area as not to be practicable to desegregate. (377 F. Supp. at 1131 and 429 F. 2d at 386) The 1970 plan also included, as noted by the Court of Appeals "imaginative use of the transportation system utilized to bring students from non-zoned rural areas [heavily predominantly black and historically transported] to schools within the City of Montgomery." (429 F. 2d at 384)

The District Court in the May 1974 opinion found that since 1970, the board "worked with the plaintiffs and the United States in an effort to keep its plan updated, and changes in attendance zones and school facilities have been proposed and approved by this Court". (377 F. Supp. at 1127)

The background of the current litigation commenced in August of 1972 with the filing by the School Board in the District Court of a motion seeking leave of the Court to make certain enrollment changes from those proposed and approved by order of the Court made and entered on February 25, 1970.

The August 1972 proposed changes involve the construction of new school facilities and resulted in further desegregation of the system as a whole through rerouting of some peripheral non-zoned county transportation.

Shortly after the filing of the motion for enrollment changes, representatives of a predominantly white apartment complex located in the "non-zoned peripheral area" petitioned to intervene in the case upon the basis that students from the predominantly white

area were proposed by the motion of the Board to be transported to a heavily desegregated elementary school rather than to less integrated facilities which the petitioners there claimed were substantially closer to their homes.[3] The District Court summarily denied this petition for intervention.

On August 14, 1972 the United States filed a response to the Board motion for enrollment changes which stated that the changes proposed did not conflict with the prior orders of the Court. The United States noted that previous enrollment variations were not due to discriminatory Board conduct and specifically observed that: "the student enrollment figures and the stability of the system for the past two years indicate that a unitary school system is being established in Montgomery County."[4]

On August 22, 1972 the District Court approved the enrollment changes and reserved ruling on the construction proposals pending the filing of 1972-73 enrollment and transportation reports.

After the Board filed the enrollment and transportation reports, as ordered, the District Court on July 3, 1973 approved and authorized immediate commence-

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[3]These white petitioners objected to being transported to Forest Avenue, then 40% black rather than to Bear, then 13% black, Dannelly, then 10% black or to Floyd, then 25% black.

[4]Defendant's Exhibits 2 and 3 in the April 24, 1974 District Court hearing show that after an investigation into the reason some white children did not attend formerly black schools in September 1970 was not due to any type of Board action. The District Court found from the investigation by Department of Justice that school officials acted in good faith to do everything possible to implement plan.

ment of the new construction as set forth in the August 1972 motion. This approval and authorization was without objection from any party.

On August 23, 1973 a joint motion of the parties was filed requesting additional enrollment changes to further desegregate the system as a whole. Specifically this joint motion requested the court to permit the predominantly black Billingslea School to be closed and the students assigned to a predominantly white facility and for predominantly white students to be reassigned to the previously black Houston Hill facility from Goodwyn, a predominantly white school.

The August 1973 joint motion set forth the agreement of the parties to continue their study toward the elimination of such one race schools as may be required by *Swann v. Charlotte-Mecklenberg*, 402 U. S. 1, 91 S. Ct. 1267. 28 L. Ed. 2d 554 (1970) giving special attention to achieving a desegregation solution for the Carver complex and the Booker T. Washington Junior High School facility. This joint motion set forth the time table for the filing of the plaintiff's plan and the Board's plan which were presented to the District Court during five days of evidentiary hearings during April of 1974.

On May 22, 1974 the District Court approved the board plan as last modified. In the May 1974 order the District Court found and explained that the plan submitted by the petitioners here—plaintiffs and plaintiffs intervenors—were solely to achieve racial balance in the schools, were unduly and unnecessarily disruptive and that they would not achieve as much

realistic and stable desegregation as would the board plan.

The District Court found that the board plan would result in the effective desegregation "of the system as a whole" and that the Court was "convinced that considered as a part of a complete system, under the facts of this case" the Board plan is "constitutionally acceptable". (377 F. Supp. at 1137-1138.)

The Court of Appeals affirmed on April 11, 1975 and denied Rehearing and Rehearing En Banc on June 27, 1975, *Carr v. Montgomery County Board of Education,* 511 F. 2d 1374 (5 Cir. 1975)

BACKGROUND OF PLAN SUBMISSIONS

During the Fall of 1973 the Board considered and evaluated every possible desegregation technique and measure (377 F. Supp. at 1131) in evaluating the Montgomery system as a whole. In accord with the order of the Court approving the joint motion of the parties, special attention was given to achieving a desegregation solution for the Carver complex and for Booker T. Washington Junior High School. In addition the relation of each school in the system to the entire system was considered. Predominantly one race schools were thoroughly studied and analyzed to determine whether they could reasonably be desegregated in an effective, workable and practical manner. Consideration was given to transportation increases; hazards and difficulties in exchanges of students and desegregation results. The location and circumstances surrounding predominantly one race schools was care-

fully analyzed from every point of view.[5] This analysis was presented to the District Court in the form of oral testimony and by written responses of the School Board which were filed in the District Court to suggestions of the United States, and by Responses of Board to plaintiffs' plan. During the Fall of 1973 the United States made numerous suggestions which were carefully studied and in most instances implemented by the Board.[6]

The plan of the Board which was approved by the District Court reflects many months of study and analysis, including the considerations set forth above.

The District Court allowed the plaintiff-intervenors to file a plan when the petitioners-plaintiffs did not comply with the Court ordered filing schedule. (Feb-

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[5]Detailed explanations were given covering each of the remaining predominantly one race schools as to location, factual surrounding circumstances and desegregation techniques considered.

[6]The United States suggested rerouting transportation of white Lanier students to Carver and zoning white area of Town & Country Estates into Carver; the assignment of white students from Jeff Davis to Lanier to maintain "*stable desegregation*" and a "workable plan"; white Baldwin students to Carver Junior and some black children from Carver to Floyd, Cloverdale or Goodwyn and some black students from Carver to Bellingrath; reassignment of black students from Bellingrath peripheral zone to Floyd, Cloverdale or Goodwyn, Later the United States recommended a higher white percentage in Carver Senior High and that whites be transported from Chisholm to Houston Hill (formerly black). The United States suggested that black elementary children from the closed Chilton and converted Goode Street facilities be assigned to "predominantly white schools in the eastern section of the City; and from Booker Washington Junior High to predominantly white schools. The many suggestions of the United States are incorporated in the Court approved plan along with many other effective desegregation measures.

ruary 15, 1974 Order and Memorandum Opinion of District Court) The plaintiff petitioners thereafter did file their plan.

EVIDENTIARY PROCEEDINGS IN THE DISTRICT COURT

Following extensive pretrial depositions and discovery[7] the hearings in the District Court below consumed five full days of trial. Each party was afforded an opportunity to present and to fully explain all aspects of each respective desegregation plan. The case of the plaintiff-petitioners lasted one day; the plaintiff-intervenor-petitioners and Board each utilized two days of trial presentation.

Prior to trial the parties each presented responses to plans submitted by the other parties. (The United States filed on January 15, 1974 their "suggestions" in lieu of a plan.)

The Board filed thorough and detailed responses to these suggestions as well as to the plans of the plaintiff-petitioners and of the plaintiff-intervenor-petitioners. In addition the Board filed a thorough and detailed response to a plan submitted and later withdrawn by the United States on behalf of Maxwell Air Force Base. The Maxwell plan called for a grade restructuring of

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[7]Deposition of William Silas Garrett, Superintendent; Dr. Gordon Foster and Dr. Larry Winecoff; Motion to Produce filed by plaintiff-intervenors; interrogatories propounded by plaintiff-intervenors and by United States on behalf of Maxwell Air Force Base; student dot map prepared by all parties in cooperation pursuant to order of District Court and upon information compiled by the Board.

all senior high schools with each facility consisting of one grade for all students in the system.

Following trial, extensive post trial briefs were filed by all parties.

THE PLANS BEFORE THE COURT

Board plan approved by District Court:

The Board plan as approved by the District Court starts with the 1970 plan and utilizes in addition to the desegregation techniques therein involved, many additional transportation route changes involving both black and white students, zone changes, the closing of physically inferior schools, the consolidation of schools and the construction of new schools. The present plan continues the pairings and the utilization of nonzoned rural transportation as set forth in the 1970 plan.[8]

The Board plan reassigns approximately 4,000 white and 5,000 black children. (377 F. Supp. at 1132) There will be 2401 white children transported to schools which are predominantly black or would be predominantly black without the white transportation involved. As in 1970 and in accord with the 1970 approved plan black students are transported from the heavily predominantly black rural peripheral areas to suburban schools which would be predominantly white without such black transportation.

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[8]The 1970 plan in addition closed 2 predominantly white schools —Pike Road and Cloverdale elementary; one formerly white school, Pintlala Junior High and 4 predominantly black schools, Hall, McDavid, Booker Washington Sr. High and Georgia Washington Senior High. Since this time one formerly white school (Pine Level) and one predominantly black school (Billingslea) have been closed.

There will be a total of 11,477 students transported under the Board plan—6659 black and 4818 white. Of the number of black transported students, 4158 are from the predominantly black county peripheral area and are transported to formerly white schools on the edge of Montgomery. These students live in areas which have always been transported. An additional 972 black students are transported from predominantly black rural areas to schools in the southern part of the county which also have always been transported schools (Catoma, predominantly white; Pintlala, formerly white and Dunbar Elementary which was paired in 1970 with the Montgomery County High, formerly white facility). The remainder of the black transported students, i.e., 1479 are transported within established zones and in accord with the provisions of the Board plan. This number compares with the 2401 white students who are transported to predominantly black schools or to schools which would be predominantly black without such white transportation.

The conversion of the virtually all-black Georgia Washington School (1-9 facility) to a desegregated junior high complex and the construction of the two new elementary facilities will further desegregation in 14 schools throughout the system. This is accomplished by zone adjustment and through further utilization of the peripheral nonzoned county transportation.

The Carver complex is effectively desegregated with white children being transported to the junior and senior high schools resulting very substantial actual desegregation.

White children are transported to the Houston Hill facility resulting in a white enrollment of over 50%.[9]

Under the Board plan, desegregated extra-curricular activities are expanded and integrated inter-school participation through joint seminars and educational clinics are developed. (377 F. Supp. at 1131)

As found by the District Court, all of the students in the Montgomery system under the Board plan will attend a substantially desegregated school the majority of their school careers. Over 80% of the black children in the system will attend a substantially desegregated school for at least six grades out of twelve. (377 F. Supp. at 1132).[10]

Under the Board plan over 85% of the students in the system will attend a heavily desegregated school during all twelve years and every child in the system, black and white, will attend a substantially desegregated senior high school. One hundred percent of the black children in the system will attend a substantially desegregated high school facility. (377 F. Supp. at

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[9]The Board originally proposed substantial lower white enrollment of approximately 40% at Carver Senior High and Houston Hill. However, the United States objected to this on the basis that the Board must achieve a desegregated plan which realistically promises to work.

[10]Only those students assigned to McIntyre Junior High are excepted from this figure (with the exception of Montgomery County High which was not included in any of the plans which were before the Court) and the District Court specifically found that the McIntyre facility "is impossible to effectively desegregate in a stable and workable manner". The students assigned to McIntyre will attend a desegregated senior high school. It is significant that under the plaintiff-intervenors' plan A, McIntyre Junior High is left substantially black at 65%.

1132.) Every formerly all white school in the Montgomery school system will, under the Board's plan, be substantially desegregated. Several formerly all white schools will now be predominantly black. Further, several formerly all black schools will become predominantly white. (377 F. Supp. at 1132) All of the black children from the rural county areas who are transported to city schools will attend a predominantly or majority white facility and under the plan no white child is transported past a majority black school to a majority white school.

The petitioners attack the Court approved plan on two main grounds: (1) the remaining one race schools and (2) the assignment of more blacks than whites to accomplish desegregation.

Remaining one race schools: Mr. Silas Garrett, the Superintendent of Schools for the Montgomery system, explained in testimony below, each remaining one race school as to the location of the facility and practicalities of desegregation. Mr. Garrett detailed the transportation hazards and difficulties involved in attempting to desegregate these facilities. Mr. Garrett testified that the Board considered assigning additional white students to each of these facilities. From the Superintendent's testimony; as was reflected in the written response of the Board filed in the District Court, each of these schools is located deep in the heart of a black residential area and each is several miles from any appreciable number of white residents.[11] The Dis-

[11]It is highly significant that the annual per pupil expenditures in the overwhelming majority of these schools substantially exceeds the system wide average.

trict Court found that all white students within a reasonable distance of these schools, are, in fact, assigned thereto. (311 F. Supp. at 1132.) The additional pairings, clusterings and satellite zone techniques would not produce effective, realistic and workable desegregation. (311 F. Supp. at 1132.) Students would be assigned and exchanged distances of from 8 to 10 to 15 miles each way. Mr. Garrett testified in detail and specifically as to each of these remaining one race schools and that they could not be desegregated in a workable and practical manner.[12]

When the Montgomery system is evaluated as a whole (there are 48 schools in the system under the approved plan); the record amply supports the finding of the District Court that the remaining predominantly one race schools are (1) genuinely non-discriminatory and (2) cannot be effectively and realistically desegregated in a practical and workable manner. In this regard the trial court specifically held:

> An indepth analysis of the school board's plan impresses this court that the continued existence of some substantially predominantly black schools is genuinely non-discriminatory. 311 F. Supp. at 1132.
>
> This Court desires to emphasize that the remaining predominantly black schools in this school system under the board's plan cannot be effectively desegregated in a practical and workable manner. 377 F.

[12]The Superintendent also testified that the school system is on a fixed budget with no legislative authority to raise revenue. That the Board is without funds to finance a satellite zoning transportation plan and that from an educational standpoint "travel time is wasted time" "every dollar you spend for transportation comes out of instruction".

Supp. at 1135.
The school authorities in the Montgomery school system have taken affirmative action to the extent required by the law and have achieved the greatest possible degree of actual desegregation, taking into account the "practicalities of the situation".. 311 F. Supp. at 1135.

Of the ten elementary schools listed by the District Court as continuing to remain substantially predominantly black[13] three are formerly all white facillities and were majority white in 1969 immediately prior to implementation of the 1970 plan.[14] Two of these predominantly black elementary schools have had stable though not numerically substantial desegregation since 1970.[15]

The black elementary students in the remaiming substantially predominantly black elementary schools will comprise 14.3% of the entire elementary enrollment of the system or approximately 28% of the black elementary enrollment. These black students will attend a desegregated school in other portions of their school careers with the vast majority going on to a desegregated junior high school[16] and all going to a desegre-

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[13]The District Court finds that each of these is "located deep in black residential areas" and "the white students residing in these areas are assigned to the nearest of these schools. While this has to some extent desegrated practically all of these schools, no ratio has been accomplished that satisfies the plaintiffs and plaintiff-intervenors". (377 F. Supp. 1132)

[14]Davis 74 blacks and 651 whites in 1969; Pintlala 70 blacks and 188 whites in 1969 and Bellinger Hill 42 blacks and 151 whites in 1969.

[15]Paterson 54 whites projected under 1970 plan; 35 in attendance in September, 1970; 29 in attendance in September 1972 and 32 in

gated high school.[17] The students assigned to Daisy Lawrence, Booker T. Washington Elementary; Carver Elementary; Fews, and Loveless which the Court found could not be effectively desegregated in a practical, workable and realistic manner, (377 F. Supp. at 1132) comprise 7.3% of the total school population of 36,376 projected by the 1974-75 plan and as previously noted 100% of these children will attend a heavily desegregated senior high school.

McIntyre Junior High School which the Court also found could not be effectively further desegregated in a practical, workable and realistic manner, (377 F. Supp. at 1132) comprises 2.2% of the total school population and its students will attend the desegregated Carver Senior High. The District Court carefuliy stated:

> This court desires to emphasize that the remaining predominantly black schools in this school system under the Board's plan cannot be effectively desegregated in a practical and workable manner. 377 F. Supp. at 1135.

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attendance in March 1974. Hayneville Road 150 whites projected under 1970 plan; 58 in attendance in September, 1970; 42 in attendance in September of 1972; 29 in attendance March, 1974.

[16]Hayneville Road to desegregated Goodwyn (66% white) and Floyd (65% white); Fews to desegregated Carver Junior High (61% white); Booker T. Washington to desegregated Capitol Heights (62% white) and Cloverdale (67% white); Paterson to desegregated Houston Hill (65% white); Daisy Lawrence to desegregated Carver Junior High (61% white).

[17]Lee 63% white; Lanier 57% white; Jeff Davis 62% white and Carver 61% white. (Actual 1974 enrollment reflects approximately 52% white)

> In each instance this court has examined and re-examined the evidence and has determined that these predominantly black schools exist and continue to exist without any discriminatory Board conduct. The system as a whole will be desegregated. (Emphasis supplied) 377 F. Supp. at 1135.

Assignment of black and white students to accomplish desegregation: As to the second thrust of petitioners' attack of the Court approved plan, it has been previously noted that 4000 white children are reassigned with 2286 white children being transported to predominantly black schools or to schools which would be predominantly black without this white transportation. In addition 350 white children are transported from what is presently the Jefferson Davis zone to the Lanier zone without which assignments Lanier would be predominantly black. This is in accord with the suggestion of the United States to afford workable desegregation in Lanier. These white children are transported from the peripheral area to further the desegregation of the system.

Transportation is provided primarily in the Montgomery system to students in the rural county areas. Since the 1970 H. E. W. plan called for the children in these nonzoned county peripheral areas to be assigned to suburban white schools, some more black children than whites logically will be transported. It was without dispute that the county is substantially predominantly black.

Of the 3,157 black elementary children transported 2,206 of these are from the predominantly black county rural areas which have always been transported.

This leaves only 950 black students transported in zoned areas which compare with the 1,308 white elementary students who will be transported under the Board plan.

The plaintiffs' plan: The plaintiffs' plan was prepared by Dr. Gordon Foster, a professor at the University of Miami. Dr. Foster testified in the District Court that his assignment was to remove the racial identifiability of the schools in the Montgomery system. In determining racial identifiability of the school, the sole factor considered by the plaintiffs was the racial composition of the student enrollment of the particular school. ". . . no consideration whatsoever to the other indicia in school desegregation cases such as faculty, transportation, facilities and extracurricular activities". (377 F. Supp. at 1141.)

At the elementary and junior high school level, Dr. Foster determined that 48.5% of the total elementary and junior high school enrollment was black. From this percentage figure, 48.5%, he used a 15% variation to determine the racial identifiability of the elementary and junior high schools of the system; that is, any elementary school or junior high school with an enrollment of less than 33.5% black was racially identifiable as white; if the enrollment was more than 63.5% black the school is racially identifiable as black. (311 F. Supp. at 1128-1129.)

At the high school level, Dr. Foster determined that 45.5% of the total high school enrollment was black. From this percentage figure, 45.5%, he again used a 15% variation to determine the racial identifiability of schools in this system. This is to say any high school

with an enrollment of less than 30.5% black is racially identifiable as white. If the enrollment is more than 60.5% black, the school is racially identifiable as black. The plaintiffs used clustering and pairing extensively in grade structures 1-2, 1-3, 1-4, 3-6, 4-6, 5-6 and 1-6. (311 F. Supp. at 1128-1129).

In testimony it was determined that the plaintiffs actually paired and clustered *schools* as opposed to areas with very little apparent regard to proximity. This is made apparent by the "adjustments" the plaintiffs performed prior to pairings or clusterings, i.e., black children were sent from the Carver Elementary Zone to Hayneville Road and from the Hayneville Road Zone to Cloverdale prior to the three-way clustering of Hayneville Road, Crump and Bear. It is noted that Hayneville Road is on the extreme western edge of Montgomery, with Bear and Crump being on the extreme esatern side of town. After the "adjustments" which the plaintiffs made by simply moving children from Carver to Hayneville Road and from Hayneville Road to Cloverdale, a ratio of 50.4% was achieved *in each of these schools.* By such "adjustments" prior to clusterings or pairings, the plaintiffs in their original proposal, were able to effect a balance of within 1/10th of 1% of the exact racial percentage in each of the schools paired or clustered with two exceptions.[18] The exact racial balance varies by 2/10ths of 1% in these exceptions. (311 F. Supp. at 1128) As noted, the schools paired or clustered range in grade structures 1-2, 1-3, 1-4, 3-6, 4-6 and 5-6 and eleven elementary schools under the plaintiffs' plan are left 1-6. Under

[18]Goode Street 46% black paired with Morningview 45.8% black and Bellinger Hill, 47.8% black paired with Forest Avenue, 47.6% black.

the plaintiffs' plan 7,555 or 43% of the total number of elementary students would be reassigned and according to Dr. Foster, some 5,204 students would be transported for the first time under his elementary plan. The plaintiffs reassign a total of 12,618 or 36% of the total enrollment in the Montgomery system, and require additional transportation for 7,196 students over present transportation or a 64.3% increase. The plaintiffs closed two school facilities, i.e., Booker Washington Junior High and Chilton and restructure the grades in twenty-five others. Under the plaintiffs plan 47.6% of the elementary children in the system would be transported with 60% of the junior high and 38% of senior high school students being transported. (311 F. Supp. at 1128-1129).

Dr. Foster explained that his shifts and adjustments prior to pairing were "bookkeeping procedures" and that the zone lines were not changed prior to such adjustments. Therefore under the plaintiffs' clustering and pairing proposals, zones would turn into a hodgepodge of confusion. The percentages between schools after such shifting and transferring are almost equal with the distance between schools not being considered. It is apparent that shifting, reassignment and transportation for racial balance, was, in fact, the objective of the plaintiff's plan.[19] The plans submitted by the plain-

[19]Dr. Foster testified that in assignments for racial balance, "You would deliberately set about to have each school come out absolutely even". It is apparent from the adjustments made prior to the pairings of schools as opposed to consideration of distances and zones that this approach was, in fact, used in developing the plaintiffs' plan. It is also significant that the plaintiffs have paired racially unidentifiable schools according to Dr. Foster "in one case, and maybe two."

tiffs and the testimony of Dr. Foster amply support the finding of the District Court that:

> It is evident, and this Court finds, that fracturization of grade structure and the pairing and clustering of schools in the Montgomery school system, as proposed by the plaintiffs, *is for the sole purpose of obtaining a strict racial balance in each elementary school involved.* (Emphasis supplied) 377 F. Supp. at 1129.

With the tremendous number of students to be reassigned and transported under the plaintiffs' plan, with no regard being given for the time and distance to and from the schools, it is apparent that the District Court was justified in concluding that the plan of the plaintiffs would not effectively desegregate the Montgomery County school system in a workable and practical manner. (377 F. Supp. at 1129).

Plaintiff-Intervenors' Plan: The plaintiff-intervenors' plan as prepared by Dr. Larry Winecoff originally consisted of three separate proposals, i.e., Plan A. Plan A Alternate and Plan B. The varying approaches taken in these three plans constitute a significant indication of the comparable desegregation results by all possible desegregation techniques and approaches. The plaintiff-intervenors' plan was analyzed in depth before the District Court. Dr. Winecoff uses the same type tolerance factors as does Dr. Foster in determining whether the racial ratio of each school is "acceptable". However Dr. Winecoff used 10 to 15 percent as his tolerance in determining racial identifiability. (311 F. Supp. at 1130).

Although all of Dr. Winecoff's proposals start with geographic zoning with interzone transportation imposed in some instances, Dr. Winecoff testified that in determining major geographical areas, he made an effort to balance the black and white population. An example of his balancing approach is seen in his explanation of the Flowers and Daisy Lawrence exchange of students:

> Flowers and Daisy Lawrence—picked up all the students that were furtherest from Flowers for transportation and didn't get quite enough white students, so we picked up a few more from this area, also going to Daisy Lawrence. The same thing with this area; we didn't pick up quite enough blacks out of this zone. We are getting very close to Daisy Lawrence, so we used these students who were in the Flowers zone but would require transportation to Flowers.

The "zones" in many instances run from county line to county line—the central zone for grades one through three runs from the Alabama River on the west side of Montgomery to the eastern most line of the city; the zones in many instances are ten to twelve miles long and at places therein are only three or four blocks wide.[20] (311 F. Supp. at 1130). Plaintiff-intervenors' Plan A includes arbitrarily selected transportation pockets in non-contiguous zones which in at least three instances actually cover or include the school which children are presently attending, which children living adjacent thereto are presently attend-

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[20]Dr. Winecoff described these zones in testimony as "somewhat compact single geographical zones."

ing, but from which facility they would be transported great distances under the plaintiff-intervenors' Plan A.

In Plan A plaintiff-intervenors' divide the system into a 1-3; 4-6; 7-9 and 10-12 grade structure. This structure did not fit in some instances and a grade structure of 1-6 is left in one school.

Plan B which the plaintiff-intervenors "abandoned" shows still another approach using a 1-3, 4-7, 8-10 and 11-12 grade structure. Plan B left 16 racially identifiable schools according to Dr. Foster's tolerances.[21]

Plaintiff-intervenors' Plan A leaves Bellinger Hill 70% black; Peterson 80% black; Fews 65% black; McIntyre 85% black and McMillan 84% black.

Plaintiff-intervenors' Plan A Alternate leaves Loveless 100% black; Carver Elementary 85% black; McMillan 84% black; Bellinger Hill 70% black; Peterson 81% black; Fews 65% black; Paterson 70% black and Daisy Lawrence 97% black.

To accomplish the questionable degree of desegregation[22] set forth above, Dr. Winecoff under Plan A which he testified to be preferable to his other, would transport approximately 16,584 students or 45.45% of the overall student body of the system. The plaintiff-intervenors' transportation includes approximately 2,000 elementary children who would be transported for the first time under their Plan A. (311 F. Supp. at

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[21]These include Hayneville Road, 98% black; Carver 98% black; McMillan 78% black; Loveless 98% black; Dalraida 0% black; Dannelly 8% black, Daisy Lawrence 99% black.

[22]Dr. Winecoff testified that there were no educational advantages afforded by his plan that were not included in the Board plan.

1130) Under Plan A 20,988 students would be reassigned or 57.6% of the overall total enrollment including the reassignment of 12,644 elementary children and/or 68.4% of the overall elementary students in the system; and 5,475 or 54.3% of the junior high together with 2,869 or 35.7% of the senior high school students (311 F. Supp. at 1130).

Dr. Winecoff under his Plan A closes six schools[23] and restructures grades in thirty-three additional schools.[24] Dr. Winecoff calculated his distances and transportation difficulties "as the crow flies" using arcs of 2 and 2½ miles on the map. The 1-3 zones under Plan A do not correspond with the overall 4-6 zones for individual schools and entirely new zones are drawn for grades 7-9. No two areas feed the same elementary and junior high schools. Thus children are reassigned to different localities and with different children at grades 1-3; 1-6; 7-9 and 10-12. An example of the continuing problem that will exist through the years under Plan A is seen in the assignment of students from the Montgomery East section of Montgomery. Here under plaintiff-intervenors' Plan A children in grades 1-3 are transported to the Georgia Washington facility located approximately ten miles out in the county. These same

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[23]Booker Washington Elementary; Booker Washington Junior; (Carver Elementary is increased to 1,067 students which Dr. Winecoff testified is administratively too large for an elementary facility); Carver Junior High; Chilton; Highland Avenue Elementary and Madison Park.

[24]One of these restructurings proposes to make Baldwin a 4-6 facility instead of a junior high school. Dr. Winecoff testified that when the four story structure at Baldwin is considered, that he would not "want to send primary students to a four story structure and largely for fire regulation reasons".

children in grades 4-6 are brought back to the city and assigned to the Eastern By-Pass School and then sent back to Georgia Washington for grades 7-9 to be returned to the city to attend Jeff Davis for grades 10-12. The 1-3 and 4-6 arrangement is not a pairing but an entirely new zoning of the city with arbitrarily selected interzone transportation superimposed in the elementary grades of 1-3, so that the rural percentages would work out.

We respectfully submit that the District Court was amply justified in the factual finding:

> "The evidence reflects, and this Court now finds, that the plan proposed by the plaintiff-intervenors for the elementary, junior high, and senior high schools in the Montgomery school system is designed to achieve a racial balance in these schools. (311 F. Supp. at 1130)

REASONS FOR DISALLOWANCE OF WRIT

ARGUMENT

The decision which the petitioners seek to review establishes the keen awareness of the District Court of the controlling constitutional principles in school desegregation as enumerated by this Court in *Swann*, *Green*, *Davis* and *Brown I* and *Brown II*.[25-29] The District Court Judge below has lived with this case for

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[25]*Swann v. Charlotte-Mecklenberg*, 402 U. S. 1
[26]*Green v. County Board of Education*, 391 U. S. 430
[27]*Davis v. Board of School Commissioners Mobile County*, 402 U. S. 33 (1971)
[28]*Brown v. Board of Education*, 347 U. S. 483
[29]*Brown v. Board of Education*, 344 U. S. 141

many years and has an exceptional awareness of the facts surrounding the Montgomery school system. The Supreme Court has specifically recognized Judge Johnson's thorough familiarity with the Montgomery school system. *United States v. Montgomery County Board of Education,* 395 U. S. 225, 23 L. Ed 2d 263, 89 S. Ct. 1670. The District Court prior to writing the order here sought to be reviewed, gave petitioner thorough and exhaustive evidentiary hearings and painstaking consideration. Voluminous evidence was offered and considered. We have attempted in this brief to detail the pretrial, evidentiary and post trial proceedings afforded by the District Court.

This case is indeed a classic example of a district court being in the best position to determine whether a school system has carried the burden of satisfying the court that the racial composition of some schools in the system is not the result of present or past discriminatory action on the part of a school board. *Swann v. Charlotte-Mecklenberg,* 402 U. S. 1, 28 L. Ed 2d 554, 91 S. Ct. 1267. It is noted here that the factual finding of "genuinely nondiscriminatory" and the finding that some schools could not be desegregated in a practical, reasonable or realistic manner were subsequently accepted by the Court of Appeals, which has had prior occasion to review the record of the Montgomery system.

The district court decision establishes that all types of desegregation techniques were in fact considered in this case. When the lack of overall and systemwide desegregation achieved by such techniques is compared with the increased transportation costs and with the impracticable and unworkable nature of the proposed

measures, it is apparent that the trial court very correctly found that: "the evidence in this case reflects that the plans proposed by the plaintiffs and plaintiff-intervenors will accomplish very little stable, long term desegregation in this system" (377 F. Supp. at 1135) and "would place an excessive and unnecessarily heavy administrative burden on the school system." (377 F. Supp. at 1129)

The Board plan places over 85% of all of the students in this system in desegregated schools. All children will attend a desegregated senior high school and over 80% of the black children in the system will be in a desegregated school for a majority of their school careers. Every formerly all white school in the Montgomery system will, under the Board's plan, be substantially desegregated. Several formerly all white schools will now be predominantly black. Further, several formerly all black schools will become predominantly white schools. (377 F. Supp. at 1139).

The plaintiffs and the plaintiff-intervenors leave all black schools remaining under their plans and leave many racially identifiable schools under the "tolerances" of their experts.[30]

All possible and conceivable desegregation techniques were presented and considered in the District Court. The plaintiff-petitioners presented a plan and a hastily drawn revision thereof which included pair-

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[30]It is significant that Dr. Winecoff testified that these "tolerances" would vary in their application from one school district to another depending on racial composition of the various communities. The arbitrary nature of such mathematical tools is apparent.

ings, clusterings and three and four-way shuttling of students between schools. The United States on behalf of Maxwell Air Force Base presented and then withdrew a plan which would have placed one high school grade in each of three school facilities and then presented and withdrew a plan which would have assigned all students in the ninth, tenth and eleventh grades to each of four school facilities. Dr. Winecoff presented on behalf of plaintiff-intervenor-petitioners' Plan A, Plan A Alternate, and a Plan B, which was abandoned as undesirable. By virtue of these plans the District Court was called upon to consider grade restructuring of every conceivable combination, satellite zoning, elongated zoning, compact zoning, pairing, clusterings, shuttle busing, busing and even the staggering of the opening of school times. The Court directed each party to submit detailed critiques and responses to the plans submitted; five days of evidentiary hearings were conducted. After extensive post trial briefs the Court concluded:

> The school authorities in the Montgomery school system have taken affirmative action to the extent required by the law and have achieved the greatest possible degree of actual desegregation, taking into account the "practicalities of the situation." (377 F. Supp. at p. 1135).

The many, many proposals, techniques, shuttlings and shiftings presented by the plaintiffs and the plaintiff-intervenors and by the United States when compared with the results achieved thereby, give strong credence and amply support the findings of the District Court that some remaining one race schools in this

system just cannot be desegregated in a practical, workable and realistic manner.

THE DISTRICT COURT PROPERLY FOUND, UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, THAT THE BOARD PLAN ACHIEVES THE GREATEST POSSIBLE DEGREE OF ACTUAL DESEGREGATION.

The District Court below in analyzing and *considering* the many desegregation plans and techniques presented, concluded under the facts and circumstances, that the Board's plan would accomplish the greatest degree of actual and workable desegregation. The District Court carefully follows the constitutional mandates set forth in *Swann,* supra, *Davis,* supra, *Green,* supra, and *Brown,* supra.

The petitioners in brief seemingly fail to grasp the significance of the District Court order. The court below does not give blanket approval to the continued existence of all predominantly one-race schools in all circumstances and under all factual situations. The District Court does not say that a proximity or neighborhood plan at the elementary level will accomplish a unitary system in all circumstances and under all factual situations. The District Court does say that a unitary system may exist even though some genuinely nondiscriminatory one-race schools remain and even though some elementary school assignments are to a neighborhood school or to one in proximity to the home of elementary children.

The Court below does find that the Montgomery Board met the burden of proof in justifying and explaining the continued existence of one-race schools.

(*Swann v. Charlotte-Mecklenberg*, supra) and the fact that elementary children are in large measure assigned the school nearest their homes shall not in and of itself under the facts of this case render the plan unconstitutional. The Court finds that school compositions are, in fact, genuinely nondiscriminatory under the Montgomery Board plan and finds that under the facts and circumstances of this case that some schools cannot be further desegregated in an effective, realistic, practical or workable manner. The District Court considered the other options available and concluded that the plans presented by the plaintiff-petitioners and by the plaintiff-intervenor-petitioners are unrealistic and create unnecessarily heavy administrative burdens and disruption. The plans of plaintiff-petitioners and plaintiff-intervenor-petitioners are found not to accomplish effective and workable desegregation and, in fact, leave many schools which are racially identifiable under their "tolerance" standards. It is obvious from the plans of petitioners that they are designed solely to achieve a racial balance.[31] This is proven by the way Dr. Foster

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[31]The plan of the petitioner obviously is designed to produce an exact mathematical balance by whatever means are necessary and regardless of how many noncontiguous areas are involved. Such is constitutionally unwarranted and impermissible; in *Winston-Salem Forsyth County Board of Education v. Scott*, 404 U. S. 1221, 31 L. Ed 2d 441, 92 S. Ct. 1236 Mr. Chief Justice Burger specifically held:

". . . the District Court on reconsideration following the remand seems to have thought that it was compelled to achieve a fixed racial balance reflecting the composition of the total county system. The explicit language of the Court's opinion in *Swann* suggests a possible confusion on this point. I do not attempt to construe that language, but simply recite it verbatim: *'The Constitutional Command to desegregate schools does not mean*

shifted students from one school to another prior to pairing or clustering such schools with two or three others to achieve an almost exact racial balance between the schools so paired or clustered. Dr. Winecoff uses satellite zoning from one side of town to the other with elongated zones extending from the Alabama River on the West to practically the county line on the East. Even with this Dr. Winecoff leaves many "racially identifiable schools" according to his standards.[32] The findings of the District Court amply establish that the Court was correct in concluding that no workable or practical desegregation would be realized from the plaintiff-petitioners or plaintiff-intervenor-petitioners' plans and that the disruption occasioned by the implementation of such plans would be excessively disruptive.

A. THE DISTRICT COURT PROPERLY FOUND REMAINING ONE-RACE SCHOOLS TO BE GENUINELY NONDISCRIMINATORY.

Since the District Court opinon, the Supreme Court has again written to one-race schools. In *Milliken v. Bradley*, 418 U. S. 717, 41 L. Ed 2d 1069, 94 S. Ct. 3112; the Court through Mr. Justice Burger observed:

> In Swann, for example, we were dealing with a large but single independent school system and a unanimous court noted: 'Where the proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that

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that every school in every community must always reflect the racial composition of the school system as a whole', 402 U. S. at 24, 28 L. Ed 2d at 571." (31 L. Ed 2d at 448)

[32]See 377 F. Supp. 1129-1130.

> are all or predominantly of one race [the school authority has] the burden of showing that such school assignments are genuinely nondiscriminatory." 402 U. S. at 26, 28 L. Ed 2d 554. See also Keyes, supra, 413 U. S. at 208, 37 L. Ed 2d 548, *However, the use of significant racial imbalances in schools within an autonomous school district as a signal which operates simply to shift the burden of proof, is a very different matter from equating racial imbalance with a constitutional violation calling for a remedy.* Emphasis supplied (41 L. Ed 2d at p. 1089, Note 19).

It is apparent that the facts and circumstances surrounding school assignment in each school system must be independently evalued in consideration of the existing circumstances and systemwide options available. This is seen from the cases which have discussed the continued existence of one-race schools. *Northcross v. Board of Education, Memphis,* 489 F. 2d 15 (4 Cir. 1973) Cert. Den. 416 U. S. 962 (1974).

There was a finding of *nondiscriminatory student assignment* in the Montgomery case which is detailed and factual. The District Court found that the Board under facts and circumstances of the case, has accomplished the *greatest degree of actual and workable desegregation.* The Court of Appeals in the 1970 appeal of this case, emphasized:

> There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. *The matter must be assessed in light of the circumstances present and the options available in each instance.* Green v. County School Board of New Kent County, 1968,

391 U. S. 430, 439, 88 S. Ct. 1689, 1691, 20 L. Ed 2d 716. (Carr v. Montgomery County Board of Education, 429 F. 2d 383, 385-386.)

B. THE DISTRICT COURT PROPERLY FOUND THAT REMAINING ONE RACE SCHOOLS UNDER THE BOARD PLAN COULD NOT BE DESEGREGATED IN A PRACTICAL AND WORKABLE MANNER.

A careful analysis of the position of the Petitioners reveals that they actually urge the removal of "racial identifiability" (which is but another way of stating the achievement of racial balance), regardless of workability, practicality, administrative feasibility or hardship. The Petitioners take the position that as long as buses can be bought they should be judicially required without regard to budget, transportation costs and regardless of the resultant increased distance to and from schools and the resultant educational impingement. (Appendix page A to this brief carefully analyzes the comparative transportation costs occasioned by the Petitioners' plans that were presented to the District Court). The Superintendent, who the District Court found to be an experienced administrator, testified that all transportation expenditures had to come from instruction and that the Montgomery system is on a fixed budget without means to increase revenue. Appendix B to this brief analyzes and compares the disruptive features of plans of the plaintiff-petitioners and plaintiff-intervenor-petitioners. For example and as found by the District Court, the plaintiffs' plan would reassign 12,685 students or 36% of the total school system requiring transportation for 17,971 children or 49.4% of the school system. Similarly plaintiff-inter-

venor-petitioners' plan would require reassignment of 20,988 students or 57.6% of the total school system requiring transportation for 16,587 children or 45.5% of the school system. (Appendix B to this brief).

The extreme measures proposed by petitioners to eliminate some of the remaining one race schools were detailed to the District Court. In many instances students, who would be bused for the first time would have to be transported eight to ten to twelve miles each way, tremendously multiplying travel time and creating transportation difficulties and hazards. The results achieved by such measures are not realistic or practical; for example and in one of many, many instances, the plaintiff-intervenor-petitioners project at 65% black enrollment at the McIntyre Junior High School which under their plan would be at the expense of the 61% white enrollment which the Board projects at the formerly all black Carver Junior High.

Justices White, Douglas, Brennan and Marshall, while dissenting in *Milliken v. Bradley*, supra, significantly made the following observation and analysis:

> Viewed in this light, remedies calling for school zoning, pairing and pupil assignment become more and more suspect as they require that school children spend more and more time in buses going to and from school and that more and more educational dollars be diverted to transportation systems. Manifestly, these considerations are of immediate and urgent concern when the issue is the desegregation of a school system where residential patterns are predominantly segregated and the respective areas occupied by blacks and whites are heavily populated

> and geographically extensive. *Thus, if one postulates a metropolitan system covering a significantly large area, with the population evenly divided between whites and Negroes and with the races occupying identifiable residential areas, there will be very real practical limits on the extent to which racial identifiable schools can be eliminated within the school district....* (Emphasis added) 41 L. Ed 2d at 1102).

The School Superintendent in the instant case made just this point in testimony when he stated that since elementary school enrollment is approximately 50% black and 50% white and since to some significant extent, the blacks live on one side of the city and whites on the other, to "remove the racial identifiability of each school" would of practical necessity require massive cross town busing and exchange of students. This was also found to be the case by the District Court.

We respectfully submit that the transportation difficulties as explained by the Board during testimony at trial and as outlined in Appendices A and B to this brief, are real, vital, immediate and constitutionally acceptable considerations in determining the "very real practical limits" on what can reasonably and legally be required of a school board. On May 17, 1974 the Court of Appeals for the Fifth Circuit in *Arvizu v. Waco Independent School District,* 495 F. 2d 499, through Judge Gewin, recognized:

> Transportation hazards and difficulties are, under *Swann,* justifiable reasons for noninclusion of certain grades in a school desegregation plan. See Ellis v. Board of Instruction of Orange County, 465 F. 2d 878 (5 Cir. 1972); Lee v. City of Troy Board of

Education, 432 F. 2d 819 (5 Cir. 1970) (495 F. 2d at p. 504 n. 9.)

The comparative desegregation achieved at both the elementary and junior high level under the plans which were before the Courts below give substance and validity to the District Court's finding that remaining one race schools in this system under the Board plan could not be effectively desegregated in a practical and workable manner. (Not in a manner that promises realistically to work) *Green v. New Kent County*, 391 U. S. 430, 20 L. Ed 2d 716, 88 S. Ct. 1689.

The Supreme Court in *Davis v. Board of School Commissioners*, 402 U. S. 33, 28 L. Ed 2d 577, 91 S. Ct. 1289, specifically noted that "actual" desegregation should be achieved *"taking into account the practicalities of the situation"* (91 S. Ct. at 1292).

In construing the language in regard to practicalities, the Fourth Circuit in the case of *Thompson v. School Board of City of Newport News, Virginia*, 465 F. 2d 83, (4th Cir. 1972) specifically stated:

> It seems implicit from this mandate that "practicalities" do represent a factor to be weighted by the District Court in passing on a plan of desegregation; and that *cross-busing is not to be automatically ordered*, irrespective of all considerations of distance, time required for travel, *traffic hazards, and age and maturity* of students involved. (Emphasis added) (465 F. 2d at 88).

The Supreme Court in *Swann v. Charlotte-Mecklenberg*, 402 U. S. 1, 91 S. Ct. 1267, 28 L. Ed 2d 554,

noted that the age of children is a critical factor in considering a busing proposal:

> It hardly needs stating that the limits on time or travel will vary with many factors, but probably *with none more than the age of the students.* (Emphasis added) (28 L. Ed 2d 554)

In *Northcross v. Board of Education of Memphis,* 489 F. 2d 15, Cert. Den., 416 U. S. 962 (1974), the Sixth Circuit supra, with approval, recognized the necessity of considering practicabilities in a desegregation case and *shed significant light as to what would be judicially approved in the area of remaining one-race schools. This Court denied certiorari in the Northcross case which left 19 all black elementary schools, 2 all black high schools and 2 all black junior high schools.* In *Northcross* as in Montgomery, there are no remaining all white schools. The Court in *Northcross* specifically held:

> The practical considerations set forth in Swann which influenced the District Court's decision in this case are as follows: First, the limited usefulness of racial quota ratios; secondly, the necessity of tolerating some one-race schools because minority groups concentrate in urban areas; thirdly, the logical problems inherent in remedial alteration of attendance zones; and lastly, the limitations on travel that must be considered when transportation remedies are employed. (489 F. 2d at 17)

The District Court considered specific and detailed reasons as to exactly why it was not practical, realistic or feasible to attempt to assign additional white children to the schools remaining predominantly black un-

der the Board's proposal.[33] White children have been previously assigned to all of these facilities except one.[34] The District Court, on prior occasions, recognized that the white children previously assigned did not attend because of some factor other than discriminatory Board conduct. (See p. 9-10 of this brief)

There will be no all-white schools at all under the Board's plan and no one-race high school with a single remaining one-race junior high. The Board and the District Court considered the techniques of clustering, pairing, and cross-town busing. The desegregation results achieved by such techniques were not of a substantial nature and did not justify the tremendous disruption involved.

The attack made in the brief of Petitioners on the District Court order concerning "white flight" is misplaced and attempts to interject an artificial issue. Petitioners here attempt actually to set up a "straw man". Actually the "White Flight Phenomenon" and as seen from the record, was injected into the case by the Petitioners and by the United States.

In the response of the *plaintiff-petitioners* to the plan of the plaintiff-intervenor-petitioners, the following statement is made:

> History has taught us in this case that the assignment of a substantial minority of whites to inter-city, traditionally black schools, creates the risk of white

---

[33]Significantly, under Dr. Winecoff's plan 2 of these schools are closed and 5 are left "racially identifiable" under his "tolerance" standards.

[34]Loveless Elementary as discussed in the prior order of the Court of Appeals, 429 F. 2d 382, 386.

exodus to peripheral areas with lower black enrollment.

In the government's "suggestions" filed on January 15, 1974, their term "white flight" is used as follows:

> While the "white flight phenomenon" is clearly not grounds for failing to order desegregation of a school system, *Cooper v. Aaron,* 358 U. S. 1 (1958); *Brown v. Board of Education,* 349 U. S. 294 (1955), courts have properly considered its impact in seeking to achieve a stable, workable desegregation plan for a school system. See e. g. 483 *United States v. Board of School Commissioners,* 483 F. 2d 1406 (7th Cir. 1973). In view of the past segregation experience at the Carver High School, the nature and size of the educational park at Carver, and the duty to achieve a desegregation plan that "promises to work" (Green v. County School Board, 391, U. S. 430 (1968), the United States believes any desegregation plan for this area should follow the guidelines set forth below (suggestions to assign additional whites to Carver).

Again the *United States* in responding to the plan of the Board states:

> As we pointed out in our earlier submission, courts have properly considered the impact of "white flight" in seeking to achieve a stable, workable desegregation plan for a school system. *U. S. v. Board of Commissioners,* 483, F. 2d 1406 (7 Cir. 1973)

The plaintiff-intervenor-petitioners use the term "white flight" in their responses to the plan submitted

by Maxwell Air Force Base and specifically state the following:

> The white parent, who is already dissatisfied with his child attending an integrated school will therefore have an additional and we might say, a more valid reason, for sending his child to a private school.

The District Court found that the Board plan would produce the greatest actual desegregation and would result in a unitary school system. This was in accord with all governing constitutional principles in school desegregation cases.

CONCLUSION

For the above and foregoing reason, we respectfully submit that the petition for a writ of certiorari is due to be denied.

Respectfully submitted,

Vaughan Hill Robison
Joseph D. Phelps

Attorneys for Respondents

October 25, 1975

TRANSPORTATION COSTS OF EACH PLAN
COMPARED WITH CURRENT TRANSPORTATION COST

1973-1974 Transportation Cost 11,176 Students Currently transported times $83.93, cost per pupil	$ 937,990.67[1]	
1974-1975 Transportation Cost Projected under Board's 3/29/74 Plan 11,477 Students transported times $83.93	963,264.61[2]	
Increased Transportation Costs of Board Plan		$ 25,273.94
1974-1975 Transportation Cost under Plaintiff's Plan		
17,971 Students Transported times $83.93	1,503,773.80	
85 Additional Buses at $10,000.00 each to transport 6,741 Additional Students	850,000.00	
Additional Plant Facilities and Additional Personnel for Increased Transportation	763,000.00	
Total:	$3,116,773.80	
Increased Transportation Cost of Plaintiff's Plan		$2,178,783.13

Footnotes appear on Page 52

APPENDIX A

PAGES BOUN

16,587 Students Transported times $83.93	$1,392,146.90	
69 Additional Buses at $10,000.00 each to Transport 5,411 additional Students	690,000.00	
Additional plant facilities and additional personnel for increased transportation	763,000.00	
	$2,845,146.90	
Increased transportation cost of Plaintiff-Intervenor's Plan A		$1,907,156.23
1974-1975 Transportation Cost Projected Under Plaintiff-Intervenor's Plan A 1-3 Alternative		
15,503 Students transported times $83.93	$1,301,166.70	
55 Additional buses at $10,000.00 each to transport 4,327 additional Students	550,000.00	
Additional plant facilities and additional personnel for increased transportation	763,000.00	
Total:	$2,614,166.70	
Increased transportation cost of Plaintiff-Intervenor's Plan A		$1,676,176.03

1. The budget of current revenues, 1973-74 (Government's Exhibit 4 to Garrett's deposition of 4/12/74) shows $19,070,921.81 total receipts. Current transportation costs constitutes 4.990 of the total receipts.

2. Based on current receipts of $19,070,921.81 projected transportation costs of $963,264.61 under the Board's Plan constitutes 5% of the total receipts.

3. Based on current receipts projected transportation costs of $3,116,773.80 under the plaintiff's plan constitutes 16.390 of the total receipts.

4. Based on current receipts projected transportation costs of $2,845,146.90 under plaintiff-intervenor's plan A constitutes 14.90 of the total receipts.

5. Based on current receipts projected transportation costs of $2,614.166.70 under plaintiff-intervenor's plan A. Alt. alternate constitutes 13.7% of the total receipts.

PAGES BOUND VERTICALLY

	District Court Approved Plan of Board	Plaintiff's Plan	Plaintiff-Intervenors Plan A	Plaintiff-Intervenors Plat A. Alt.
Percent of students to attend substantially desegregated schools majority of school career	100 %	100 %	100 %	100 %
Number of completely all-black schools remaining	0	1	0	1
Percent of all pupils in systems in heavily integrated schools	85 %	97 %	94 %	90 %
Percent of pupils in system to attend heavily integrated senior high school	95.2%	95.2%	95.2%	95.2%
Number of schools closed	3	2	6	6
Schools in which grades are restructured	4	25	33	33
Total number of students and percentage of system reassigned	9,008 - 25 %	12,685 - 36 %	20,988 - 57.6%	20,882 - 57.4%

COMPARATIVE ANALYSIS OF PLANS

APPENDIX B

	District Court Approved Plan of Board	Plaintiff's Plan	Plaintiff-Intervenors Plan A	Plaintiff-Intervenors Plat A. Alt.
A. Number and percentage of system of elementary children reassigned	3,208 - 17.4%	7,555 - 43 %	12,644 - 68.4%	12,538 - 67.9%
B. Number and percentage of junior high children reassigned	3,723 - 38 %	3,493 - 36 %	5,475 - 54.3%	5,475 - 54.3%
C. Number and percentage of system senior high students reassigned	2,077 - 25.2%	1,637 - 26 %	2,869 - 35.7%	2,869 - 35.7%
Total number and percentage of students to be transported	11,477 - 31.5%	17,917 - 49.4%	16,587 - 45.5%	15,503 - 42.6%
A. Number and percentage of elementary students to be transported	4,465 - 24 %	8,791 - 47.6%	3,405 (GRADES 1-3) 3,932 (GRADES 4-6) 7,337 - 40 %	2,321 (GRADES 1-3) 3,932 (GRADES 4-6) 6,253 - 34 %
B. Number and percentage of junior high students to be transported	4,156 - 41 %	6,035 - 60 %	5,157 - 51 %	5,157 - 51 %
C. Number and percentage of senior high students to be transported	2,856 - 36 %	3,091 - 38.4%	4,093 - 51 %	4,093 - 51 %

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-476

ARLAM CARR, JR., *et al.*,

and

PENELOPE ANNE JENKINS, *et al.*,

Petitioners,

vs.

MONTGOMERY COUNTY BOARD OF EDUCATION, *et al.*

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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Opinion dated May 22, 1974

ARLAM CARR, JR., *et al.*,

Plaintiffs,

NATIONAL EDUCATION ASSOCIATION, INC., AND PENELOPE ANNE JENKINS, *et al.*,

Plaintiff-Intervenors,

UNITED STATES OF AMERICA,
AMICUS CURIAE,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, *et al.*,

Defendants.

Civ. A. No. 2072-N.

United States District Court,
M. D. Alabama, N. D.

May 22, 1974.

OPINION

JOHNSON, Chief Judge.

This school desegregation case, having been previously before this Court and the appellate courts upon several occasions, is again submitted. The present submission is upon the pleadings, the evidence presented orally over a period of several days, and the briefs and arguments of the parties. Upon this submission this Court now makes appropriate findings of fact and conclusions of law. As authorized by Rule 52, Federal Rules of Civil Procedure, these findings and conclusions are incorporated in this memorandum opinion.

Opinion dated May 22, 1974

I. History of Case

This case was originally filed in May, 1964, when a group of black children and their parents, with the United States participating as *amicus curiae*, asked this Court to enjoin the Montgomery County Board of Education from "continuing the policy, practice, custom, and usage of maintaining and operating a compulsory biracial school system."[1] Although ten years had passed since the Supreme Court's decision in Brown v. Board of Education,[2] the schools of Montgomery County, as was true in many areas of the United States, were completely segregated; one set of schools was operated exclusively for white students and staffed entirely by white teachers, and one set was operated for black students and staffed by black teachers. Thus, on July 31, 1964, this Court declared that the Montgomery schools were being operated in violation of the law of the United States and enjoined defendants from continuing to operate these schools on a racially segregated basis.[3] But this Court fully "realized that desegregation of the public schools cut across the social fabric of this community and that there were both administrative and other practical problems for the board to cope with in order to comply with the law."[4] Consequently, the board was allowed to proceed with desegregation in a gradual manner. A freedom-of-choice plan pro-

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[1] Carr v. Montgomery County Board of Education, 232 F.Supp. 705 (M.D.Ala. 1964).

[2] 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

[3] At the time this Court entered its order in July, 1964, there were approximately 25,000 white students and 15,000 black students attending the Montgomery County school system.

[4] 289 F.Supp. at 657.

posed by the board as the means for integrating four grades was accepted.

Almost two years later, on March 22, 1966, this Court ordered that the freedom-of-choice plan be implemented in 10 of the 12 grades for the 1966-67 school year and that the plan be fully operative throughout the system commencing with the fall of 1967.[5] In addition, this Court decreed that:

> Race or color will henceforth not be a factor in hiring, assignment, reassignment, promotion, demotion, or dismissal of teachers and other professional staff, with the exception that assignments shall be made in order to eliminate the effects of past discrimination.[6]

On August 17, 1967, and February 7, 1968, the United States requested this Court to require defendants to take further steps to disestablish the dual school system in Montgomery County. Upon review of the record, this Court found that the school board had failed to discharge its affirmative duty to eliminate the dual school system.[7]

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[5] Carr v. Montgomery County Board of Education, 253 F.Supp. 306 (M.D.Ala. 1966).

[6] *Id.* at 310. This decree originally required the process of desegregating the faculty and professional staffs to commence with the school year 1966-67. But when the Fifth Circuit subsequently allowed the Mobile County system until the school year 1967-68 to end its policy of hiring and assigning teachers and staff by race, this Court, on its own motion, modified the March 22 order to give the Montgomery board an additional year before requiring desegregation of the system's faculty and staff. Again, this Court was cognizant of the administrative problems and practical ramifications of its order, and thus sought to give the board some additional time in which to meet its constitutional obligation to desegregate Montgomery's dual school system.

[7] Carr v. Montgomery County Board of Education, 289 F.Supp. 647 (M.D.Ala. 1968).

Under the freedom-of-choice plan, only 550 blacks were attending traditionally white schools. No white children were attending traditionally black schools. Of the approximately 550 black teachers and 815 white teachers, only 32 were teaching in schools that were predominantly of the opposite race.

On the basis of this evidence, it was found necessary to establish specific requirements governing minimum amounts of progress in future desegregation efforts. First, this Court ordered that the board must move toward a goal under which the ratio of white to black faculty members in each school was substantially the same as it was throughout the system.

Second, the school board was required to obtain approval from the State Superintendent of Education prior to the construction of any new school or any additions to existing schools.

Third, the board was ordered to eliminate race as a factor in the assignment of students to school buses and in its designation of bus routes. Finally, this Court observed that the board's freedom-of-choice plan was not working and that unless the plan became more effective in eliminating the dual school system, the Court would have no alternative except to order some other plan.[8]

For the first time in this case, defendants appealed this Court's order.[9] On appeal, the Fifth Circuit affirmed the

[8] In its supplemental order granting partial stay of the order pending appeal, this Court observed that the board had attempted to operate part of the Montgomery system under the freedom-of-choice plan and part under the neighborhood school plan. Under this scheme, the board sought to perpetuate a series of segregated schools in exclusively white neighborhoods. Needless to say, this Court found this to be an egregious violation of the board's affirmative duty to establish a unitary school system.

[9] This fact is significant in that it underscores the efforts of the Montgomery board to comply with the law as reflected by the

March 2, 1968, order.[10] A petition for rehearing *en banc* was denied by the Fifth Circuit.[11] Finally, the Supreme Court granted *certiorari* and also affirmed this Court's order.[12]

In the summer of 1969, plaintiffs and the United States again filed motions asking this Court to require the board to take additional steps to disestablish Montgomery's dual school system.

An evidentiary hearing was held on February 24, 1970, to consider plans submitted by the United States and the board. The board's plan essentially adopted the basic elements of the plan proposed by the government experts

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mandates of this Court. Unlike many school boards that opposed desegregation at every step, the Montgomery County Board of Education recognized that it had an affirmative duty to desegregate its school system. As the Fifth Circuit noted on appeal, "good faith conduct on the part of any litigant in any court, especially in a court of equity and, more particularly, in the sensitive area of desegregation, is a vital element for appropriate consideration." 400 F.2d 1, 2 (5th Cir. 1968).

Although the board contended that this Court's order was unprecedented in its imposition of "ratio" requirements, this Court was firmly convinced that its order was "the *minimum* the applicable law will allow under the peculiar facts and circumstances presented and that each and every feature of the order and injunction entered in this case on February 24, 1968, is not only authorized but *required* by the applicable law." 289 F.Supp. at 660 (emphasis added).

[10] 400 F.2d 1, 8 (5th Cir. 1968).

[11] 402 F.2d 782 (5th Cir. 1968).

[12] United States v. Montgomery County Board of Education, 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969). The Supreme Court concluded its opinion by noting that "it is good to be able to decide a case with the feelings we have about this one. The differences between the parties are exceedingly narrow." *Id.* at 236.

with some minor changes and refinements.[13] Under the board's projections for the 1970-71 school year, this plan provided that there would be no all-white schools in the county and only one all-black school. Over plaintiffs' objections that this plan did not go far enough in eliminating the dual school system, this Court approved the board's plan with some modifications of its own.[14] On appeal, the Fifth Circuit affirmed this Court's decision to implement the board's plan.[15] The Fifth Circuit added the following cautionary note:

> Once a school board has acted, however, the courts have a solemn obligation to determine whether the structure designed by the school board will house a unitary school system. This obligation is unremitting, and there can be no abdication, no matter how temporary. Accordingly, any imprimatur of judicial approval must be entered with the caveat that until construction of a unitary system is completed, change orders, when appropriate, will be issued to ensure that the designed structure in fact accommodates a unitary system and not a bifurcated one.[16]

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[13] This plan included proposals to close certain schools in the system, to pair several rural schools, to adopt neighborhood zoning of the schools within the city of Montgomery, and to transport students from non-zoned rural areas to schools within the city.

[14] In its order, this Court made clear that the law does not require racial balance or similar student ratios throughout a school system. "Complete disestablishment of the dual school system to the extent that it is based upon race is required."

[15] 429 F.2d 382 (5th Cir. 1970). In addition, the Circuit Court directed that the majority-to-minority transfer provisions of the plan be altered to reflect a change in the law since this Court's order of February 25, 1970.

[16] 429 F.2d at 386.

Since this Court's order of February 25, 1970, the board's plan has remained largely unaltered. The board has worked with plaintiffs and the United States in an effort to keep its plan updated, and changes in attendance zones and school facilities have been proposed and approved by this Court. But changes in the facts of this case—largely changes in residential patterns—and recent clarifications by the Fifth Circuit and the Supreme Court of the obligation of a school board to establish a unitary school system now necessitate an overall evaluation of this system's compliance with the requirements of the law. Accordingly, on August 29, 1973, all parties were ordered to submit their suggestions and proposals for the further desegregation of the Montgomery system.

It is important at this point to emphasize two factors that have characterized this continuing litigation. First, this Court has often recognized the practical problems and administrative difficulties in eliminating a dual school system that had been closely tied to long-established social patterns.[17] A successful school system demands support from the community—both black and white. To facilitate this support, this Court has attempted to avoid imposing rigid or inflexible requirements on the board and, where possible, has allowed the parties to work out their own differences. In this way, this Court has constantly strived for a workable solution to the problems encountered in converting from a dual system to a "unitary system in which racial discrimination would be eliminated root and branch."

Second, all the parties to this litigation share the same goal: establishment of a "desegretated, unitary and nonra-

[17] See, *e.g.*, 289 F.Supp. at 657. See also note 6, *supra*.

cial school system." [18] Every court that has reviewed the record of this litigation has observed that the differences between the parties have been unusually small.[19] Moreover, the Montgomery County School Board has been repeatedly complimented for its good faith efforts to comply with the requirements of the law.[20] It is worthy of pride that the ten-year history of this case has been characterized throughout by cooperation from all the participants.

II. An Analysis of the Plans Before the Court

A number of desegregation proposals have been submitted for the Court's consideration. In evaluating these proposals, it is important to keep in mind that the real controversy now presented centers around the operation of the elementary schools.

On January 15, 1974, the defendant board submitted its initial proposal, and the United States submitted a number of detailed suggestions. On February 14, 1974, the United

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[18] Brief for the board before the Supreme Court. See 395 U.S. 225, 236, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1968).

[19] 395 U.S. at 236. See note 12, *supra*. 400 F.2d at 2; 429 F.2d at 386-387.

[20] This Court has often complimented the board on its performance of its constitutional obligation to desegregate the Montgomery schools. See 400 F.2d at 3 n. 3. Appellate courts, upon the review of this record, have similarly expressed their approval of the board's good faith efforts throughout these proceedings. See 395 U.S. at 230, 236; 400 F.2d at 2-3. An example of this approval by the Fifth Circuit: "If more district courts and more school boards had been as sensitive as those here involved to the requirements of the law, the path to the goal of school desegregation in this circuit would have been infinitely smoother than it had been." Carr v. Montgomery County Board of Education, 429 F.2d 382 (5th Cir. 1970).

States submitted a response to the defendants' first proposal, which incorporated additional desegregation suggestions. On February 16, 1974, the plaintiffs submitted their plan. On March 29, 1974, the defendants submitted their second plan, which was a revision of their January 15 proposal. On April 1, 1974, the plaintiff-intervenors submitted their proposal. In addition, the United States proposed a high school desegregation plan devised by authorities at the Maxwell Air Force Base in February and March, 1974. By letter of April 5, 1974, to the Court, the United States withdrew this proposal. Finally, on May 8, 1974, the school board presented to the Court certain modifications and adjustments to its March 29, 1974, plan.

A. *Plaintiffs' Plan*

Plaintiffs' proposed plan was devised by Dr. Gordon Foster, Director of the University of Miami Title IV Desegregation Center. The Foster plan at the senior and junior high school levels in general starts with the existing board proposal and seeks to achieve greater desegregation by the rerouting of existing bus routes and the reassignment of students to other schools which would require considerable increase in transportation. On the high school level, the Foster plan does not differ significantly from the board's plan. At the elementary level, through a combination of pairing of contiguous schools and clustering and pairing of noncontiguous schools, the Foster plan proposes to desegregate the schools within the system within the "15 percent" guidelines established by Dr. Foster. Dr. Foster testified that contiguous pairing was used wherever possible to minimize transportation. However, because of the degree of residential segregation in Montgomery, this was

felt by Dr. Foster to be feasible in only three instances. The pairing and clustering of elementary schools was the means used by Dr. Foster to bring each elementary school in each paired or clustered group, under his plan, within one-tenth of one percent of the exact racial percentage in each of the schools paired or clustered with two exceptions. The exact racial balance varies by two-tenths of one percent in these exceptions. The schools paired or clustered ranged in grade structures one-two, one-three, one-four, three-six, four-six, five-six, and 11 elementary schools under the plaintiffs' plan are grades one-six. The evidence reflects that the pairing or clustering of schools as proposed by the plaintiffs' plan would require extensive cross-city busing from beyond the westernmost part of the city to beyond the easternmost part of the city and the same is true from east to west. Elementary children at all grade levels, one through six, would be involved in this cross-city busing. It is evident, and this Court finds, that fracturization of grade structure and the pairing and clustering of schools in the Montgomery school system, as proposed by the plaintiffs, is for the sole purpose of attaining a strict racial balance in each elementary school involved.

Forty-three percent of the total number of elementary students enrolled in the Montgomery school system would be reassigned under the plaintiffs' plan. The plan would also necessitate the reassignment of a large number of elementary teachers since the teachers within the system should continue to teach at the grade levels where they have attained the greatest competency. This Court is impressed that the plaintiffs' plan would be disruptive to the educational processes and would place an excessive and

unnecessarily heavy administrative burden on the school system.

The plaintiffs' plan for the junior high school level adopts basically the defendant board's plan with certain significant changes. These changes consist of new cross-city and cross-county busing. This busing is proposed by the plaintiffs in order to bring the projected percentages of black students enrolled in each junior high school within the system within the 15 percent tolerance allowed under Dr. Foster's plan.[21] Dr. Foster's proposal would require a reassignment of 36 percent of the total junior high school enrollment in the system.

Dr. Foster proposes a plan of desegregation at high school level which requires noncontiguous and satellite zoning to more racially balance each high school. To accomplish this, 22 percent of all high school students would be reassigned from schools they presently attend.

Following is a summary of newly assigned and additionally transported students under the plaintiffs' plan:

Grade Level	Number Reassigned	Percentage of Total Enrollment Reassigned
1– 6	7,555	43
7– 9	3,493	36
10–12	1,637	22

[21] Dr. Foster uses a 15 percent variation or tolerance to determine the racial identifiability of the elementary and junior high schools in the system. That is to say, any elementary or junior high school with an enrollment of less than 33.5 percent black is racially identifiable as white. If the enrollment is more than 63.5 percent black the school is racially identifiable, according to Dr. Foster, as black. These variations are determined on the elementary and junior high school levels on the basis that 48.5 percent of the total elementary and junior high school students enrolled in the system are black and that 45.5 percent of the total high school enrollment is black.

A total of 12,685 students, or 36 percent of the total enrollment in the Montgomery school system, would be reassigned under the plaintiffs' plan.

The students requiring additional transportation under the plaintiffs' plan are as follows:

Elementary (1–6)	5,204
Junior High School (7–9)	1,642
Senior High School (10–12)	350

B. *Plaintiff-Intervenors' Plan*

The plaintiff-intervenors' plan was prepared by Dr. Larry Winecoff, a professor at the University of South Carolina. Dr. Winecoff originally submitted two plans, Plan A, with Plan A Alternate, and Plan B. Dr. Winecoff abandoned Plan B, and no evidence was offered in support of that plan. Dr. Winecoff set similar guidelines to those used by Dr. Foster in determining those schools which he considered to be racially identifiable in the Montgomery school system.[22] However, Dr. Winecoff used 10 to 14 percent as his tolerance in determining racial identifiability.

At the elementary level the grade structure of each elementary school within the system is fracturized under the plaintiff-intervenors' Plan A. This is done by dividing the existing one through six elementary grades into one through three centers and four through six centers. Dr. Winecoff also uses the rezoning technique of strip zones running generally vertically for grades one-three and elongated horizontally for grades four-six. He also uses noncontiguous satellite zoning in his one-three grades Plan A. The evidence reflects that four of the 16 elementary schools within the system, serving grades one-three, would

[22] See note 21, *supra*.

still be racially identifiable according to Dr. Winecoff's standards under his Plan A, one-three.

In Plan A, one-three alternate, Dr. Winecoff uses the same zone lines as used in his Plan A, one-three. Judged by his tolerances, 11 of the 16 schools serving grades one-three within the system would continue to be racially identifiable under Dr. Winecoff's Plan A, one-three alternate.

Plaintiff-intervenors' Plan A, four-six, uses elongated horizontal zones extending from the east side of the city to the west side of the city. This type of strip zoning would of necessity require substantial additional transportation and would also result in many elementary children having to walk a considerable distance farther to school. In some instances they would be required to walk past another elementary school serving grades one-three. Under this proposal, five of 13 schools serving grades four-six would continue to be racially identifiable according to Dr. Winecoff's tolerances.

The evidence reflects that from 60 to 70 percent of all elementary school students within the Montgomery system would be reassigned under plaintiff-intervenors' Plan A, one-three or one-three alternate, and Plan A, four-six. Furthermore, new transportation would be required for approximately 2,000 elementary grade children under the plaintiff-intervenors' elementary plans.

Plaintiff-intervenors' junior high school plan uses strip zoning of an elongated shape running obliquely. In some instances the seven-nine school zones proposed are only four blocks in width. From 50 to 60 percent of all students enrolled within the system in grades seven through nine would be reassigned under plaintiff-intervenors' junior

high level proposal. Furthermore, approximately 2,000 students would be newly transported.

The plaintiff-intervenors' senior high plan uses strip zones. For instance, the zone for the Jeff Davis school is from two to four blocks in width in certain areas. This proposal would require the reassignment of from 30 to 40 percent of the total high school enrollment within the system. The evidence reflects, and this Court now finds, that the plan proposed by the plaintiff-intervenors for the elementary, junior high, and senior high schools in the Montgomery school system is designed to achieve a racial balance in these schools.

C. *The School Board's Plan*

The school board utilizes transportation route changes, involving both black and white students, zone changes, the closing of physically inferior schools, the consolidation of schools, and the construction of new schools in its proposed plan for the system. Mr. Silas Garrett, Superintendent of Education for the school system and an experienced school administrator, testified that the following are the criteria that were utilized in formulating the board's plan:

1. To achieve a unitary school system.

2. To provide an organizational structure which will ensure optimum educational opportunities for all children with a minimum of disruption.

3. To adjust the assignment of students to available physical facilities.

4. To utilize available funds to the greatest educational advantage.

5. To achieve the maximum possible community acceptance of the plan thereby resulting in minimal resegregation.

6. To reassign students in a manner which enhances the instructional program of the system.

7. To provide for maximum teachability through the matching of assignments with teacher competencies and training.

8. To utilize the existing transportation in a supportive role to the instructional and organizational framework of the system.

9. To minimize disruptive transition for students, school personnel, and parents and at the same time comply with the mandate of the courts in achieving a unitary system.

At the present time, the Montgomery school system is operating pursuant to a desegregation plan which was prepared by a team of HEW experts and which was approved by this Court and by the United States Court of Appeals for the Fifth Circuit.[23] The plan when originally approved assigned both black and white students to every school in the system with the exception of Loveless School, which the Court of Appeals found to be a facility located so deep in the heart of a black residential area as not to be practical to desegregate. Since the implementation of the 1970 plan, the evidence in this case reflects that the school

[23] Carr v. Montgomery County Board of Education, 429 F.2d 312 (5th Cir. 1970).

board has attempted in good faith to ensure its effective operation. Additionally, since 1970, the school board has furthered the desegregation of the Montgomery system by closing the Billingslea elementary facility and consolidating that school with the Morningview School. The board proposes extensive plans for the transition of the Georgia Washington School, one-nine, now an all-black facility, into a substantially desegregated junior high school complex. Further substantial desegregation is proposed by the board in assigning white students to Carver Senior High and Carver Junion High. The board projects 61 percent whites in both schools that have heretofore been practically all black. Many other significant and effective assignments are to be made by the board—in each instance to attempt to achieve a unitary school system. Extracurricular activities have been expanded on a desegregated basis and inter-school participation through joint seminars and educational clinics has been developed.

The evidence reflects that the board considered the techniques of satellite zoning, clustering and pairing. However, the board concluded that it could establish a unitary system through the means and methods enumerated without the disruptions of satellite zoning, clustering and pairing as proposed by the plaintiffs and plaintiff-intervenors in order to achieve what the evidence in this case reflects would be an extremely unstable desegregated school system.

The evidence presented to the Court further reflects that the population of Montgomery is so arranged that whites largely live on the east side of the city and blacks on the west. This necessarily means that pairings and clusterings would, in the main, be noncontiguous and would require cross-city busing. This, of course, would substantially

increase the time and distance that students would have to travel to and from the schools to which they would be assigned under such plan.

Under the board's plan, there will remain a few schools with a substantially predominantly black student population. All of these are at the elementary level with the exception of McIntyre Junior High.[24]

An in-depth analysis of the school board's plan impresses this Court that the continued existence of some substantially predominantly black schools is genuinely nondiscriminatory. These schools, Daisy Lawrence, Booker T. Washington Elementary, Carver Elementary, Fews, Loveless, Hayneville Road Elementary, Paterson, Pintlala, Davis and Bellinger Hill, are in each instance located deep in black residential areas; the white students residing in these areas are assigned to the nearest of these schools. While this has to some extent desegregated practically all of these schools, no ratio has been accomplished that satisfies the plaintiffs and plaintiff-intervenors. The evidence reflects, and this Court finds, that in order to further desegregate any of these facilities, satellite zoning and the cross-city busing of white students would be necessary.[25]

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[24] Plaintiff-intervenors also project a heavily black enrollment at McIntyre. Plaintiffs would, under their proposal, achieve a projected 50 percent black-white ratio at McIntyre Junior High. However, this would be accomplished by satellite zoning and by transporting 550 whites for a considerable distance from the satellite Cloverdale area and periphery area to the McIntyre school. The only purpose in this is to attempt to achieve a racial balance in this school that is located deep in a black residential area.

[25] It is significant that Dr. Winecoff under his Plan A alternate leaves Carver Elementary at 85 percent black. Under his Plan A, Dr. Winecoff proposes to bus approximately 200 white students

Further, an exchange of black students would have to be made by transporting them across the city from these school areas. This would not, under the circumstances of this case, accomplish any effective and realistically stable desegregation. In each instance the situation is a result of residential patterns and not of the school board's action—either past or present.

It is significant to an overall evaluation of the board's plan that all of the students in the Montgomery school system[26] will attend a substantially desegregated school for the majority of their school careers. Over 80 percent of the black children in the system will attend a substantially desegregated school for at least six grades of the 12. One hundred percent of the black children in the system will attend a substantially desegregated senior high facility.[27] At the junior high school level, the only junior high facility under the board's plan that is projected to be over 80 percent black will be the McIntyre Junior High facility which, as this Court has previously noted, is impossible to effectively desegregate in a stable and workable manner.

A detailed analysis of the board's plan is attached and marked as Table 2 to this opinion. The chief criticism of the plaintiffs and plaintiff-intervenors of the board's plan is that the board is putting the primary burden of desegre-

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from the various school areas to Carver which would still leave Carver Elementary at 61 percent black. These students would have to pass three or four elementary schools to arrive at Carver.

[26] The only exception involves those students in the Montgomery County High-Dunbar Elementary area—and neither the plaintiffs nor the plaintiff-intervenors seriously attempt to desegregate these schools.

[27] For instance, Lanier—57 percent white, or Carver—61 percent white.

gating the Montgomery school system on the black students. The evidence does not bear this out. Approximately 4,000 white students and 5,000 black students are reassigned under the school board's plan. Furthermore, on the junior high level the board's plan proposes that three virtually all-black facilities be converted into predominantly white ones, that is, Carver Junior High from zero percent white to 61 percent white; Georgia Washington from zero percent white to 69 percent white, and Houston Hill from 15 percent white to 60 percent white.

As to the proposal of the board regarding the senior high schools within the system, the evidence reflects that all of the city senior high schools will be substantially desegregated.

III. Applicable Law

[1, 2] For several years it has been clear, and all parties in this case recognize, that

> the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools.

Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20, 90 S.Ct. 29, 24 L.Ed.2d 19 (1969). In determining what constitutes a "unitary" school system, there are six facets of school operation which must be considered. These six criteria are (1) faculty, (2) staff, (3) transportation, (4) extracurricular activities, (5) facilities, and (6) composition of the student body. Green v. County School Bd., 391 U.S. 430, 435, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968); Adams v. Rankin County Bd. of Educ., 485 F.2d 324, 325 (5th Cir. 1973).

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A. *Faculty and Staff*

[3] In 1968, this Court ordered that the Montgomery County School Board must move toward a goal under which "in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system." As observed earlier, the United States Supreme Court affirmed that order. United States v. Montgomery County Bd. of Educ., *supra.*

An analysis of the evidence presented in this case [see Table 1] shows that the board is in full compliance with that order.

B. *Transportation, Extra-curricular Activities, Facilities*

There is no dispute as to the law regarding these indicia of desegregation. Suffice it to say that there can be no racial discrimination in any of these areas of school operation. None of the parties seriously contend the board is not in full compliance with the law in these areas. Appropriate factual findings will be made as to each criterion.

C. *Student Body Composition*

[4] While it is clear that in disestablishing a segregated school system all vestiges of racial segregation must be eliminated "root and branch," Green v. County School Bd., 391 U.S. 430, 437-438, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968), the establishment of a fixed racial quota in each school is not required by the United States Constitution. The United States Supreme Court has ruled that

> [t]he constitutional command to desegregate schools does not mean that every school in every community

> must always reflect the racial composition of the school system as a whole.

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24, 91 S.Ct. 1267, 1280, 28 L.Ed.2d 554 (1971).

Thus, it appears that a balance must be reached, one unquestionably subtle in its implications: while school system segregation must be actively disestablished, racial quotas for student population are not to be instituted.

The difficulty of analysis is most acute when the Court is confronted, as it is in this case, with several schools which contain a student population which is largely of one race. Since this Court last considered the compliance of this school system with constitutional commands, many important cases have been decided by the appellate courts, necessitating a re-examination of the law with respect to schools whose student population does not typify the general population figures. The Supreme Court has, in a general manner, addressed the question of one-race schools, writing in *Swann* that

> [t]he record in this case reveals the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city. In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. Schools all or predominantly of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation.

In light of the above, it should be clear that the existence of some small number of one-race, or virtu-

> ally one-race, schools within a district is not in and of itself the mark of a system that still practices segregation by law. The district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation and will thus necessarily be concerned with the elimination of one-race schools. No *per se* rule can adequately embrace all the difficulties of reconciling the competing interests involved; but in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one race, they have the burden of showing that such school assignments are genuinely non-discriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25-26, 91 S.Ct. 1267, 1280, 28 L.Ed.2d 554 (1971).

Several cases dealing with one-race schools have been decided by the Court of Appeals for this circuit since this Court last fully considered compliance in this school system. While neither the Court of Appeals nor the Supreme Court has adopted any explicit, clear test by which to measure the constitutional validity of one-race schools, the Court of Appeals has, since this Court's last major order

in this case, reversed district courts in school cases and held that nine all-black schools in one system could not remain in existence,[28] that insufficient pairing had been ordered when schools which could be paired were about one and one-half miles away,[29] and that 14 all-black elementary schools in one system had to be paired or rezoned.[30] Other district courts were reversed because under court-approved plans 80 percent of the blacks attended schools where their race predominates,[31] because 70 percent of all black elementary students attended one all-black school,[32] because 68 percent of the black elementary school students in a system attended schools 90 percent or more black,[33] and because 44 percent of the black students in one system attended all-black or virtually all-black schools.[34] These cases, and others like them decided since this Court's last consideration of this case, necessitate a re-examination of this case in the light of the state of the law and the facts as they exist in the Montgomery school system today.

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[28] Bradley v. Bd. of Public Instruction, 431 F.2d 1377, 1380-1381 (5th Cir. 1970).

[29] Weaver v. Bd. of Public Instruction, 467 F.2d 473, 474 (5th Cir. 1972) (all-black school 1.2 to 5.6 miles from predominantly white elementary schools); Wright v. Bd. of Public Instruction, 431 F.2d 1200, 1201-1202 (5th Cir. 1970).

[30] Mannings v. Bd. of Public Instruction, 427 F.2d 874, 877 (5th Cir. 1970).

[31] United States v. Texas Education Agency, 467 F.2d 848, 872-873 (5th Cir. 1972) (en banc).

[32] Boykins v. Fairfield Bd. of Educ., 457 F.2d 1091, 1093 (5th Cir. 1972).

[33] Allen v. Bd. of Public Instruction, 432 F.2d 362, 366 (5th Cir. 1970).

[34] Pate v. Dade County, 434 F.2d 1151, 1153 (5th Cir. 1970).

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IV. Plan Approved

[5] As is already evident from what has been stated in this opinion, this Court proposes to order implemented *in toto* the desegregation plan as proposed by the Montgomery County Board of Education on January 15, revised March 29, 1974, and modified May 8, 1974. The evidence in this case reflects that the plans proposed by the plaintiffs and by the plaintiff-intervenors will accomplish very little stable, long-term desegregation in this school system. This Court desires to emphasize that the remaining predominantly black schools in this school system under the board's plan cannot be effectively desegregated in a practical and workable manner. In each instance this Court has examined and re-examined the evidence and has determined that these predominantly black schools exist and continue to exist without any discriminatory board action. The board's proposal and this Court, in adopting same, have taken "into account the practicalities of the situation" that exist in this school system. Davis v. Board of Social Commissioners, 402 U.S. 33, 37, 91 S.Ct. 1289, 28 L.Ed.2d 577. The schools that will remain predominantly black in the Montgomery school system are the result of the concentrations of blacks in the western area of Montgomery. As the Supreme Court observed in Swann v. Charlotte-Mecklenburg, *supra*, the existence of a small number of predominantly black schools in such areas is not in and of itself a sign that a dual school system exists. The school authorities in the Montgomery school system have taken affirmative action to the extent required by the law and have achieved the greatest possible degree of actual desegregation, taking into account the "practicalities of the situation." As this Court has observed time and time again

in school desegregation cases, racial quotas and busing to achieve racial quotas are not required by the law.

A. *Elementary Schools*

The board has proposed, and this Court is adopting for elementary schools, what is in large measure a "neighborhood" or proximity plan, under which an elementary child normally attends the school nearest his home.

The Court is aware that any "neighborhood school" plan is *strictissimi juris* in this circuit and is to be adopted, if at all, only in narrowly confined instances. This is such a case.

In a *pure* neighborhood school system, as approved in Ellis v. Bd. of Public Instruction, 423 F.2d 203 (5th Cir. 1970), there are two requirements: (1) a strict proximity rule must be followed, under which neither man-made nor natural boundaries may be considered, but only travel distance;[35] and (2) the plan must be one which is effective to establish a unitary school system.

The second criterion, that the plan must effectively provide for a unitary system, was outlined in a footnote:

> [u]nder the facts of this case, *it happens that* the school board's choice of a neighborhood assignment system is adequate to convert the Orange County school system from a dual to a unitary system.

423 F.2d at 208, n. 7 (emphasis added).

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[35] "We also hold that the neighborhood system, based on school capacity, must be observed without exception. This will prevent any variance based on traffic conditions . . . . Variances by arbitrary zone lines, or for reasons of traffic, while reasonable on their face, may destroy the integrity and stability of the entire assignment plan. If Orange County wishes to maintain a neighborhood

However, in a series of cases the Court of Appeals has held that an *Ellis* neighborhood school plan, to be upheld, must provide for the ultimate conversion of a dual to a unitary school system.

In Andrews v. City of Monroe, 425 F.2d 1017 (5th Cir. 1970), the Court of Appeals held that in Monroe, Louisiana, a city with only 18 schools, an *Ellis* plan was constitutionally infirm if it left 85 percent of the black elementary students in all-black schools, or schools nearly so. 425 at 1019-1020.

In Henry v. Clarksdale Municipal Separate School District, 433 F.2d 387 (5th Cir. 1970), involving a small city with only seven elementary schools, the Court of Appeals reversed a plan which left three all-white elementary schools and four all-black. The Court of Appeals wrote that the order of the district judge "totally ignores the real key to *Ellis*, the strong caveat of footnote 7 . . . .", 433 F.2d at 390. Footnote 7 was the footnote in *Ellis* which noted that "it happens that . . . [the plan] is adequate to convert the . . . system from a dual to a unitary system." 423 F.2d at 208, n. 7.

Similarly, in Ross v. Eckels, 423 F.2d 1140 (5th Cir. 1970) (Houston, Texas, system), the Court of Appeals reversed a district judge's adoption of the *Ellis* plan where 29 percent of black students were in all-black or virtually all-black schools, 434 F.2d at 1146, n. 9, noting that each case had to be judged on its own facts. *Id.* at 1147.

In 1970 the Court of Appeals reversed a district court's adoption of an *Ellis* plan in Alexandria, Louisiana, where

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assignment system, then it must do so without variances. Each student in the system must be assigned to attend the school nearest his or her home, limited only by the capacity of the school, and then to the next nearest school." 423 F.2d at 207-208.

60 per cent of the black students were in schools where their race constituted 90 percent or more of the student body. The Court of Appeals held that

> [t]he end result is that neighborhood zoning in Alexandria, Louisiana, leaves the majority of the city's Negro students in a virtually segregated school system. The fact that the plan complies with the requirements for a neighborhood system as enunciated by this Court in [*Ellis*] does not make the system constitutionally palatable unless the plan actually works to achieve integration.

Valley v. Rapides Parish School Bd., 434 F.2d 144, 145 (5th Cir. 1970).

In a case from Lake Charles, Louisiana, the Court of Appeals reversed a district judge who had adopted an *Ellis* plan, pointing out that

> [a]s to ward 3, the Board plan is not up to constitutional standards. In many circumstances the *Orange County* approach of neighborhood schools is adequate to convert a school system from a dual to a unitary system. But, as *Orange County* itself makes clear, . . . each case turns on all of its own facts, including those peculiar to the particular system. . . . A plan which leaves two out of three black children in Lake Charles in schools all black or substantially so, . . . cannot be upheld as constitutional.

Conley v. Lake Charles School Board, 434 F.2d 35 (5th Cir. 1970).

However, the Fifth Circuit Court of Appeals has affirmed the use of the *Ellis* plan in some circumstances where the

result is a substantially desegregated school system. The Court of Appeals approved the use of an *Ellis* plan for the schools of Fulton County, Georgia (excluding Atlanta). In that case, only 18 percent of the black students attended all-black schools. While several elementary schools were largely black in composition, Judge Wisdom pointed out that "[e]very black student at some point in his school career will be exposed to complete desegregation. . . ." Hightower v. West, 430 F.2d 552, 555 (5th Cir. 1970). There,

> [a]s in so many other cases, these majority-black and all-black schools are the product of residential segregation and, historically, the location of schools to serve a segregated community.

430 F.2d at 555. The Court of Appeals found several deficiencies in the other plans offered at trial, among them that "[t]he pairing proposals . . . would produce longer walking distances and busing for these elementary school children." *Id.*

Similarly, the Court of Appeals approved the use of an *Ellis* plan in the schools of Anniston and Tuscaloosa. Lee v. Macon County Bd. of Educ., 429 F.2d 1218, 1222 (5th Cir. 1970).

The plan proposed by the school board in this case does not precisely fit the *Ellis* mold. The school assignment has not been effected by precise and mathematical distance measuring; some natural and man-made boundaries have been considered in the process of zoning. However, as this Court views *Ellis*, the *Ellis* plan in its purity is ultimately designed for the school system which is approaching unitary status and will be drawing its own lines. In such a situation a strict *Ellis* plan completely eliminates discre-

tion in student assignment, thus eliminating the possibility of discriminatory student assignment.

However, in this case the plan is under careful judicial scrutiny. This Court, long familiar with every aspect of this case, is convinced that where the board plan for *elementary* schools deviates from a strict *Ellis* proximity plan, the deviation is to maximize, rather than to minimize, desegregation; and thus is intended to help meet the constitutional burden which is upon the board.

[6] Therefore, while the school board plan does not strictly meet the absolute standard of *Ellis*, any deviation is for a permissible and proper purpose. Thus, this Court considers that the *principle* of *Ellis*—that neighborhood schools may be constitutionally proper—may be adopted by the district court *if* the line construction is under judicial scrutiny *and* the plan adopted effects desegregation of the complete system.

It is, therefore, necessary to consider whether the school board plan in this case for elementary schools is constitutionally proper.

The plan in *Ellis* itself, which the Court of Appeals held to be "adequate to convert the Orange County school system from a dual to a unitary system," 423 F.2d at 208 n. 7, provided for substantially less desegregation at the elementary level than does the school board plan in this case. In *Ellis, seventy-four percent* (74%) of black elementary pupils attended elementary schools which were at least *ninety-nine percent* (99%) black.[36]

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[36] In *Ellis*, the following elementary schools were at least 99 percent black: Callahan (99 percent); Eccleston (100 percent); Holden Street (99.8 percent); Hungerford (100 percent); Maxey (99.7 percent); Orange Center (100 percent); Richmond Heights (100 percent); Washington Shores (100 percent); Webster Ave-

While the school board's elementary plan here is better than that in *Ellis*, which was affirmed, it is also better than most of the plans which have been modified or reversed by the Court of Appeals for this circuit. For example, the Monroe, Louisiana, plan left 85 percent of the black elementary pupils in all-black schools. 425 F.2d at 1019-1020. The Clarksdale, Mississippi, plan appears to have left the elementary schools completely segregated. 433 F.2d at 390. The Alexandria, Louisiana, plan provided that 60 percent of the black students were in schools which were 90 percent or more black. 434 F.2d at 145.

[7] Thus, while the school board's elementary school plan does not completely eliminate all predominantly black schools on the elementary level, the Court is convinced that *considered as a part of a complete system, under the facts of this case,* the school board's elementary plan is constitutionally acceptable. There are several factors which the Court considers in arriving at this conclusion.

First, in this system, as Judge Wisdom has pointed out in another case, "[e]very black student at some point in his school career will be exposed to complete desegregation . . . ." Hightower v. West, 430 F.2d 552, 555 (5th Cir. 1970). Grades seven-twelve of the Montgomery system, under the board's plan, are to be completely desegregated.[37]

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nue (99 percent); and Wheatley (100 percent). A total of 6,376 black students attended those schools, out of a total black elementary school population of 8,628. Thus, 74 percent of all black elementary pupils in Orange County attended schools at least 99 percent black.

[37] The board's junior high plan would keep only 18 percent of the black junior high school students in schools 80 percent or more black [excluding Montgomery County High School], and no high school student would be in a school more than 43 percent black [excluding Montgomery County High School].

Second, the *system* as a whole will be desegregated. All of the other five indicia of a unitary school system have been completely met in this school system. Six members of the Court of Appeals,[38] concurring specially in an *en banc* case, have recently affirmed the proposition that normally the *system* as a whole is examined for purposes of determining whether the system is unitary; individual schools are not looked to for that purpose. United States v. Texas Education Agency, 467 F.2d 848, 888 (5th Cir. 1972) (*en banc*). In Montgomery County, Alabama, there is system-wide desegregation *of all six* facets and indicia of school desegregation.

Third, in the Fulton County, Georgia, case, the Fifth Circuit wrote of "the value of assigning young children to nearby schools . . . ." Hightower v. West, 430 F.2d 552, 556 (5th Cir. 1970). It cannot be denied that there is value in having elementary children attend schools near their homes. Recognition of this benefit of neighborhood elementary schools does not constitute abandonment of the goal of desegregation as required by the United States Constitution. If a neighborhood elementary school system can be effected without a sacrifice of constitutional standards, then such a plan should be adopted.

All factors considered, the neighborhood elementary school system proposed by the board is constitutionally adequate to effect desegregation under the facts of this case. This Court is convinced that to adopt the plans proposed by plaintiffs and plaintiff-intervenors would be

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It is conceded by all parties that Montgomery County High School, which is at the opposite end of the county from the city schools, cannot be effectively desegregated because of its isolation.

[38] Judges Brown, Wisdom, Gewin, Goldberg, Dyer, and Simpson.

to adopt a fixed racial quota for student population. The Supreme Court has indicated that not only is the imposition of racial quotas in schools not required, but a court may commit reversible error if it requires a fixed racial ratio in student population. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 24, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

B. *Junior High Schools*

[8] As observed earlier, under the board's plan the only junior high school facility that will be over 80 percent black will be the McIntyre facility. For the reasons previously noted, it is not feasible to further desegregate the McIntyre School in a stable and workable manner. This school continues to exist as a predominantly black school through no action on the part of the school board. Of the 13 junior high schools to be operated in the Montgomery system, McIntyre is the only one that comes close to being racially identifiable. For instance, Houston Hill (a formerly all-black school) will be 35 percent black, Goodwyn will be 34 percent black, Georgia Washington (a formerly all-black school) will be 31 percent black, Floyd will be 35 percent black, Cloverdale will be 33 percent black, Carver (a formerly all-black school) will be 39 percent black, Capitol Heights will be 38 percent black, Baldwin (a formerly all-white school) will be 73 percent black, and Bellingrath (a formerly all-white school) will be 62 percent black. This is the maximum under the circumstances that exist in the Montgomery school system that can be required of the board.

C. *Senior High Schools*

[9] The defendant board's plan on the senior high school level, as observed by the United States in its brief, "ap-

pears to be fully acceptable." As a matter of fact, there is very little, if any, controversy among the parties as far as the operation of the senior high schools in the Montgomery system is concerned.[39] The board proposes that Carver High be 39 percent black, that Jeff Davis be 38 percent black, that Lanier be 43 percent black and that Lee be 37%. Such a proposal for the senior high schools within the system is entirely acceptable.

In summary, every formerly all-white school in the Montgomery school system will, under the board's plan, be substantially desegregated. Several formerly all-white schools will now be predominantly black. Further, several formerly all-black schools will become predominantly white.

V. General Considerations

A. *Majority-to-Minority Transfer Rule*

[10] The previous orders entered by this Court in this case required the desegregation of not only the students but the faculty and staff, transportation, extra-curricular activities, and facilities and also required, among other things, a rule that the board allow any student enrolled in a school where his race is in the majority to transfer to a school where his race will be in a minority. This majority-to-minority transfer rule also requires the board to provide transportation for those electing to transfer pursuant to this rule. This transfer rule is a viable and effective doctrine in the Montgomery school system. Based on a report that was filed with the Court and made a part

[39] This is with the exception of Montgomery County High which was not proposed to be desegregated by any of the plans submitted by the parties by reason of its location in a remote area of the county.

of the records in this case, in December, 1973, over 600 blacks had elected to transfer under the majority-to-minority transfer rule. The majority-to-minority transfer policy was incorporated in the order made and entered in this case in February, 1970. Upon review of that order, the United States Court of Appeals for the Fifth Circuit in Carr v. Montgomery County Board, etc., 429 F.2d 382, directed that this Court's order be modified "in light of recent opinions of this court." In July, 1970, pursuant to the direction of the Court of Appeals, this Court ordered that the Montgomery County Board of Education shall provide transportation, if desired, for students transferring pursuant to this majority-to-minority transfer policy. The Court also ordered that students so transferring are to be given priority for space in the schools to which they transfer.

A majority-to-minority transfer provision in a school desegregation order is universally recognized by the courts as a useful tool to accomplish desegregation in a dual school system. As a matter of fact, the Supreme Court of the United States in Swann v. Board of Education, *supra*, stated:

> An optional majority-to-minority transfer provision has long been recognized as a useful part of every desegregation plan. Provision for optional transfer of those in the majority racial group of a particular school to other schools where they will be in the minority is an indispensable remedy for those students willing to transfer to other schools in order to lessen the impact on them of the state-imposed stigma of segregation. In order to be effective, such a transfer arrangement must grant the transferring student free

> transportation and space must be made available in the school to which he desires to move.

The vital importance of the effective operation of the majority-to-minority transfer has been noted by the Fifth Circuit in several cases.[40] In *Cisneros*, the *en banc* court stated:

> An overall amelioration of any possible discrimination will tend to be accomplished by the use of the mandatory majority to minority transfer provision of *Swann, supra*, 402 U.S. at 36-37, 91 S.Ct. 1267, 28 L.Ed. 2d 554, heretofore ordered by the district court. Such a provision will guarantee to both races an unfettered right to attend schools with members of an opposite race or identifiable ethnic group, and with transportation provided.

As stated, the Montgomery school board has and continues to implement a majority-to-minority transfer provision that complies with every requirement of the existing school desegregation laws.

B. *Biracial Committee*

[11] Up until this time, the Montgomery school board has not operated with the assistance of a biracial committee. In an order made and entered in this case on March 13, 1974, this Court stated:

> An over-all review of the applicable school desegregation decisions rendered since *Swann, Green*, and

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[40] Cisneros v. Corpus Christi Independent School District, 467 F.2d 142, 153 (5th Cir. 1972) (*en banc*); Ellis v. Bd. of Public Instruction of Orange County, 423 F.2d 203, 206 (5th Cir. 1970); Singleton v. Jackson Municipal Separate School District, 419 F.2d 1211, 1218 (5th Cir. 1970) (*en banc*).

> *Davis* reflects that this Court is now required to give serious consideration to the appointment of a biracial committee. The biracial committee is to be constituted by this Court from names submitted by the parties to this litigation. The committee is to review the operation of the Montgomery County transportation system and the majority-to-minority transfer rule and is to be charged with responsibility in the area of selecting school sites. The committee will be authorized to hold hearings and make recommendations to the school board in connection with any of these activities.
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> • • • • •
>
> It is further ordered that within 15 days from this date each party to this litigation submit to this Court the names of 20 citizens residing in Montgomery County, Alabama; one-half of the names submitted will be black citizens and the other half will be white citizens; the submission of these names is to be for the purpose of the Court's constituting from the names submitted a biracial committee for the purposes hereinabove discussed.

The parties have, as directed, submitted the names of citizens to the Court, and the Court has chosen from the names submitted 15 black citizens and 15 white citizens to constitute the Montgomery County school system's biracial committee. A separate order will be made and filed contemporaneously with this order designating the citizens who are to constitute this committee and outlining their functions and responsibilities. The Chairmanship of the committee will be rotated each two years with the committee selecting the chairman to succeed the initial chairman being designated by this Court. The membership of

the committee represents a cross-section of the Montgomery, Alabama, area with regard to race, sex, and ethnic and economic backgrounds. The Montgomery County Board of Education will be required to cooperate with the committee or any of its subcommittees, furnishing any information, records or documents requested by said committee.

C. *Arbitrary Tolerances or Guidelines*

As noted earlier, the plaintiffs' expert witness, Dr. Foster, and the plaintiff-intervenors' expert witness, Dr. Winecoff, instead of evaluating the system as a whole, evaluate each school within the system independently for the purpose of arriving at certain conclusions that some schools within the system continue to be "racially identifiable." In doing this, Dr. Foster uses a 15 percent variation or tolerance and Dr. Winecoff uses a 10 to 15 percent variation or tolerance to determine the racial identifiability of elementary and junior high schools in the Montgomery school system. These variations are determined on the elementary and junior high school level on the basis that 48.5 percent of the total elementary and junior high school students enrolled in the system are black. This means that, pursuant to Dr. Foster's computation (a similar procedure is followed by Dr. Winecoff), any elementary or junior high school with an enrollment less than 33.5 percent black is "racially identifiable" as white. If the enrollment is more than 63.5 percent black, the school, according to Dr. Foster, is "racially identifiable" as black.

[12] The use of such variances or tolerances is highly artificial and cannot be applied in the Montgomery County school system without severely and unnecessarily disrupting the operation of the system and without severely and unnecessarily impinging on the educational processes in the Montgomery school system. The application of such for-

mulas must of necessity proceed on the theory that a racial balance is to be achieved and is required under the law. Furthermore, the formalistic and mechanical application of the 15 percent tolerance of Dr. Foster of the 10 to 15 percent tolerance or deviation of Dr. Winecoff gives no consideration whatsoever to the other indicia in school desegregation cases such as faculty, transportation, facilities and extra-curricular activities. To label schools that do not fall within these tolerances or deviations as "racially identifiable" means that, in order not to be "racially identifiable," each school within any school system must meet certain predetermined ratios. As this Court has stated through the years time and time again, racial balance is not constitutionally required. The Supreme Court of the United States in Swann v. Board of Education, *supra*, emphasized this by stating:

> [i]f we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse. The constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.

VI. Conclusion

This Court feels an obligation to point out that its allowance of a neighborhood elementary school system does not constitute an abandonment by this Court of the goal of securing to all citizens their rights guaranteed by the Fourteenth Amendment. This Court has always strived to guarantee to all citizens, both black and white, their right to

equal protection of the laws. This Court has never balked at the enforcement of constitutional rights in racial discrimination cases. In the last nineteen years, this Court has sat in cases in which the constitutional rights of black citizens had been denied in that blacks were discriminated against when they sought an equal right to use buses,[41] airports,[42] libraries,[43] parks,[44] and YMCA's.[45] The Court has further dealt with racial discrimination in the areas of voting rights,[46] jury selection,[47] and governmental hiring by both state [48] and federal[49] governments, and has also dealt

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[41] Lewis v. Greyhound Corp., 199 F.Supp. 210 (M.D.Ala. 1961); Browder v. Gayle, 142 F.Supp. 707 (M.D.Ala. 1956), aff'd, 352 U.S. 903, 77 S.Ct. 145, 1 L.Ed.2d 114 (1957).

[42] United States v. City of Montgomery, 201 F.Supp. 590 (M.D. Ala. 1962).

[43] Cobb v. Montgomery Library Board, 207 F.Supp. 880 (M.D. Ala. 1962).

[44] Gilmore v. City of Montgomery, 176 F.Supp. 776 (M.D.Ala. 1959).

[45] Smith v. YMCA, 316 F.Supp. 899 (M.D.Ala. 1970), aff'd 462 F.2d 634 (5th Cir. 1972).

[46] State of Alabama v. Rogers, 187 F.Supp. 848 (M.D.Ala. 1960), aff'd 285 F.2d 430 (5th Cir. 1961); *United States* v. *State of Alabama*, 252 F.Supp. 95 (M.D.Ala. 1965); United States v. Parker, 236 F.Supp. 511 (M.D.Ala. 1964); United States v. Cartwright, 230 F.Supp. 873 (M.D.Ala. 1964); United States v. Penton, 212 F.Supp. 193 (M.D.Ala. 1962); United States v. State of Alabama, 192 F.Supp. 677 (M.D.Ala. 1961).

[47] Penn v. Eubanks, 360 F.Supp. 699 (M.D.Ala. 1973); White v. Crook, 251 F.Supp. 401 (M.D.Ala. 1966).

[48] NAACP v. Allen, 340 F.Supp. 703 (M.D.Ala. 1972), aff'd, 493 F.2d 614 (5th Cir. 1974); Strain v. Philpott, 331 F.Supp. 836 (M.D.Ala. 1971); United States v. Frazer, 317 F.Supp. 1079 (M.D.Ala. 1970); 297 F.Supp. 319 (M.D.Ala. 1968).

[49] Penn v. Schlesinger, 350 F.Supp. 752 (M.D.Ala. 1973), aff'd, 490 F.2d 700 (5th Cir. 1973), rehearing en banc granted (5th Cir. 1974).

with governmental districting.[50] In the school field, this Court has decided cases which involved aid to private schools,[51] school desegregation on the level of local schools,[52] statewide administration,[53] athletic programs,[54] faculty,[55] graduate schools,[56] and trade schools and junior colleges.[57] This Court stands on its record showing its willingness to protect, where necessary, the constitutional rights of black citizens against racial discrimination by government officials. This Court has not in the past allowed, and is not now allowing, the violation of constitutional rights to go

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[50] Yelverton v. Driggers, 370 F.Supp. 612 (M.D.Ala. 1974).

[51] Gilmore v. City of Montgomery, 337 F.Supp. 22 (M.D.Ala. 1972), modified and aff'd, 473 F.2d 832 (5th Cir. 1972), cert. granted, 414 U.S. 907, 94 S.Ct. 215, 38 L.Ed.2d 145 (1973); Crenshaw County Private School Foundation v. Connally, 343 F.Supp. 495 (M.D.Ala. 1972), aff'd, 474 F.2d 1185 (5th Cir. 1973); Lee v. Macon County Bd. of Educ., 267 F.Supp. 458 (M.D.Ala. 1967); 231 F.Supp. 743 (M.D.Ala. 1964).

[52] Lee v. Macon County Bd. of Educ., 292 F.Supp. 363 (M.D. Ala. 1968); 289 F.Supp. 975 (M.D.Ala. 1968); 270 F.Supp. 859 (M.D.Ala. 1967); 231 F.Supp. 743 (M.D.Ala. 1964); Harris v. Crenshaw County Bd. of Educ., 259 F.Supp. 167 (M.D.Ala. 1966); Franklin v. Barbour County Bd. of Educ., 259 F.Supp. 545 (M.D.Ala. 1966); Harris v. Bullock County Bd. of Educ., 253 F.Supp. 276 (M.D.Ala. 1966); Carr v. Montgomery County Bd. of Educ., 253 F.Supp. 306 (M.D.Ala. 1966).

[53] Lee v. Macon County Bd. of Educ., 267 F.Supp. 458 (M.D. Ala. 1967).

[54] Lee v. Macon County Bd. of Educ., 283 F.Supp. 194 (M.D. Ala. 1968).

[55] Carr v. Montgomery County Bd. of Educ., 289 F.Supp. 647 (M.D.Ala.), aff'd as modified, 400 F.2d 1 (5th Cir. 1968), aff'd 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263 (1969).

[56] Parker v. Franklin, 223 F.Supp. 724 (M.D.Ala.), aff'd as modified, 331 F.2d 841 (5th Cir. 1964).

[57] Lee v. Macon County Bd. of Educ., 317 F.Supp. 103 (M.D. Ala. 1970), aff'd 453 F.2d 524 (5th Cir. 1971).

unremedied. In adopting the school board's plan providing for elementary schools under a "neighborhood" system, this Court in all respects is following the mandate of the Fourteenth Amendment and has arrived at the conclusions stated herein upon an evaluation of the Montgomery school system *as a whole.*

Opinion dated May 22, 1974

TABLE 1

FACULTY DESEGREGATION

	Name of School	September 1973		1974-75 Projections	
		Black	White	Black	White
1	Baldwin	18	22	8	12
2	Bear	8	13	9	14
3	Bellingar Hill	4	4	4	7
4	Bellingrath	17	28	18	25
5	Booker T. Washington (Elementary)	6	7	6	6
6	Booker T. Washington (Jr. High)	5	6	To be closed	
7	Capitol Heights (Elementary)	10	15	6	7
8	Capitol Heights (Jr. High)	17	25	15	22
9	Carver (Elementary)	15	19	7	10
10	Carver (Jr. High)	8	12	13	19
11	Carver (Sr. High)	21	25	19	28
12	Cutoma	3	6	4	4
13	Chilton	4	4	To be closed	
14	Chisholm	13	21	14	20
15	Cloverdale	19	27	18	24
16	Crump	11	16	13	19
17	Daisy Lawrence	9	13	8	11
18	Dalraida	11	13	9	11
19	Donnelly	14	19	10	13
20	Davis	11	17	11	17
21	Dunbar	7	11	8	9
22	Fews	9	10	10	14
23	Flowers	12	17	11	15
24	Floyd	17	26	19	25
25	Forest Avenue	7	11	7	10
26	Georgia Washington	8	13	16	25
27	Goode Street	6	7	3	5
28	Goodwyn	22	32	22	28
29	Harrison	12	16	12	14
30	Hayneville Road	18	23	15	23
31	Head	9	13	8	11
32	Highland Avenue	7	10	7	9
33	Highland Gardens	15	20	15	20
34	Houston Hill	8	10	8	11
35	Jefferson Davis	32	61	36	59
36	Johnson	10	13	10	13
37	Lanier	37	63	39	49
38	Lee	55	65	40	65
39	Loveless	13	14	16	23
40	McIntyre	17	25	12	19
41	Machillion	7	7	6	7
42	Madison Park	3	5	To be closed	
43	Montgomery Area Voc. Center	5	14	8	11
44	Montgomery County High	9	15	9	12
45	Morningview	10	13	9	13
46	Paterson	13	14	11	14
47	Peterson	9	11	8	11
48	Pintlala	4	6	4	6
49	So. Hilltown	10	14	9	13
50	Union St. Area Voc. Center	10	13	14	17
51	Eastern Bypass (Elementary)	—	—	10	16
52	Vaughn Road (Elementary)	—	—	9	12

Opinion dated May 22, 1974

TABLE 2

ELEMENTARY

SCHOOL	Actual Enrollment, March, 1974 Black	White	Total	% Black	Projected Under Board Plan Black	White	Total	% Black
BEAR	75	503	578	12.9%	186	505	691	27%
BELLINGER HILL ELEM.	108	42	150	72	186	43	229	81
BELLINGRATH ELEM.	116	83	199	58.3	115	100	215	53
BOOK WASH. ELEM.	253	4	257	98	259	4	259	98
CAPT. HGTS. ELEM.	120	463	583	20.5	119	192	311	38
CARVER ELEM.	846	2	848	99	421	2	423	99
CATOMA ELEM.	70	163	233	30	63	154	217	29
CHILTON ELEM.	127	14	140	90	Closed-assigned to Oakrails and Head			
CHISHOLM ELEM.	338	545	883	37	326	555	881	37
CRUMP ELEM.	87	690	779	11	263	703	966	27
DAISY LAWRENCE ELEM.	449	7	456	98	445	7	452	98
DALRAIDA ELEM.	69	577	646	10.6	153	428	581	26
DANNELLY ELEM.	96	915	1,011	9.5	236	484	720	32
DAVIS ELEM.	627	89	716	87	615	91	706	87
DUNBAR ELEM.	339	50	389	87	340	51	391	87
FEWS ELEM.	443	2	445	99	640	3	643	99
FLOWERS ELEM.	126	628	754	16.7	169	573	742	23
FLOYD ELEM.	191	312	503	37.9	145	319	467	32
FOREST AVENUE ELEM.	176	269	445	39.5	172	262	434	40
GEORGE WASH. ELEM.	323	3	326	99	Consol. with new schools			
GOOCH ST. ELEM.	279	1	280	99	Converted to center for handicapped			
HARRISON ELEM.	298	433	731	40	184	427	611	30
HAYNV. RD. ELEM.	679	29	708	96	669	30	699	95
HEAD ELEM.	63	531	594	11.3	148	415	563	26
HIGHLAND AV. ELEM.	118	271	389	30.3	115	272	387	30
HIGHLAND GARDENS EL.	414	555	969	37.5	335	551	886	38
JOHNSON ELEM.	48	557	605	7.9	175	550	725	24
LOVELESS ELEM.	289	0	289	100	902	5	907	99
McINTYRE ELEM.	615	5	620	99.2	Consol. with Loveless			
MACMILLAN ELEM.	204	105	309	66	225	109	334	65
MADISON PARK ELEM.	142	0	142	100	Closed-assigned to Eastern By-pass			
MORNINGVIEW ELEM.	131	467	598	22	134	466	600	22
PATERSON ELEM.	557	32	589	94	566	34	600	94
PETERSON ELEM.	174	299	473	36.7	175	299	474	37
PINTLALA ELEM.	205	14	219	93	201	16	220	93
SOUTHLAWN ELEM.	157	491	648	24	223	492	715	31
EASTERN BY-PASS EL.					149	589	738	20
VAUGHAN RD. ELEM.					188	409	597	32
TOTALS	9,279	9,170	13,449		9,224	9,160	18,384	

JUNIOR HIGH

	Black	White	Total	% Black	Black	White	Total	% Black
BALDWIN JR.	553	635	1,193	46.7	290	107	397	73
BELLINGRATH JR.	680	373	1,053	64	659	390	1,049	62
BOOK WASH. JR.	221	0	221	100	Consol. with Capt. Hgts., Dow, and Houston Hill			
CAPT. HGTS. JR.	313	889	1,202	26	442	730	1,172	38
CARVER JR.	534	0	534	100	350	545	895	39
CLOVERDALE JR.	156	1,351	1,507	10.3	437	875	1,312	33
FLOYD JR.	159	575	734	21.6	288	541	829	35
HAYNV. RD. JR.	280	17	297	91.2	Consol. with Floyd and Goodwyn			
G. WASHINGTON JR.	160	0	160	100	357	782	1,139	31
GOODWYN JR.	259	1,339	1,598	16	540	1,031	1,571	34
HOUSTON HILL JR.	326	57	383	85	210	383	593	35
LOVELESS JR.	353	0	353	100	Consol. with McIntyre			
McINTYRE JR.	391	18	409	96	792	14	806	98
TOTALS	4,390	5,254	9,644		4,365	5,398	9,763	

SENIOR HIGH

	Black	White	Total	% Black	Black	White	Total	% Black
CARVER SR.	958	6	964	99	439	660	1,099	39
JEFF. DAVIS SR.	412	1,668	2,080	19.8	868	1,426	2,294	38
TANNER SR.	951	1,284	2,219	42.5	817	1,068	1,885	43
LEE SR.	661	1,577	2,238	30.2	929	1,560	2,489	37
MTGY. CO. HIGH SR.	391	61	452	86.5	399	63	462	86
TOTALS	3,373	4,550	7,923		3,452	4,777	8,229	

Opinion dated April 11, 1975

ARLAM CARR, JR., a minor by Arlam Carr and Johnnie Carr, etc., et al.,

Plaintiffs-Appellants,

NATIONAL EDUCATION ASSOCIATION, INC.,

Intervenor,

PENELOPE ANNE JENKINS, ET AL.,

Intervenors-Appellants,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL., ETC.,

Defendants-Appellees,

UNITED STATES OF AMERICA,

Amicus Curiae,

No. 74-2633.

United States Court of Appeals,
Fifth Circuit.

April 11, 1975.

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

We affirm the judgment of the district court for the reasons set forth in its opinion, 377 F.Supp. 1123 (M.D. Ala. 1974). The judgment of the district court is attached as Appendix A. We take note of the history of this litigation as reflected by the opinions of the district court, this court, and the Supreme Court cited in the district court's opinion. The Montgomery County school system has been under the scrutiny and surveillance of the federal judiciary for a substantial period of time and such scrutiny and surveillance will continue.

Affirmed.

Opinion dated April 11, 1975

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ARLAM CARR, JR., ET AL.,

Plaintiffs,

NATIONAL EDUCATION ASSOCIATION, INC.;
PENELOPE ANNE JENKINS, ET AL.,

Plaintiff-Intervenors,

UNITED STATES OF AMERICA,

Amicus Curiae,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL.,

Defendants.

Civil Action No. 2072-N

JUDGMENT

Pursuant to the findings of fact and conclusions of law made and entered in a memorandum opinion filed in this cause this date, it is the order, judgment and decree of this Court that:

1. The plans presented by the plaintiffs and plaintiff-intervenors for the further desegration of the Montgomery County school system be and are hereby rejected.

2. The plan presented by the defendant Montgomery County Board of Education on January 15, 1974, revised on March 29, 1974, and modified on May 8, 1974, be and is hereby approved and ordered implemented.

Opinion dated April 11, 1975

3. The school board's plan will be implemented forthwith, with the student assignments to the various schools within the system to be effective with the commencement of the 1974-75 school year.

4. The school board will file with the Court on September 15, 1974, and on February 15, 1975, and on said dates each year thereafter, written reports reflecting the actual student and teacher assignments, by race, in each school in the system.

5. The costs incurred in this proceeding be and they are hereby taxed one-half against the plaintiffs and one-half against the plaintiff-intervenors.

Done, this the 22nd day of May, 1974.

/s/ FRANK M. JOHNSON
United States District Judge

GOLDBERG, Circuit Judge (dissenting):

Respectfully, but without equivocation, I dissent.

This suit was brought in 1964 to desegregate the public schools in Montgomery County, Alabama. Its progress has been recorded at several stages in opinions by the able District Judge, by this Court, and by the Supreme Court.[1] In August, 1973, the district court ordered the parties then in this case—the plaintiffs, the defendant School Board, and the United States—to submit proposals for further desegregation of the Montgomery County system in light of

[1] Carr v. Montgomery County Bd. of Educ., M.D.Ala. 1964, 232 F.Supp. 705; further relief ordered, 1966, 253 F.Supp. 306; further relief ordered, 1968, 289 F.Supp. 647, aff'd, 5 Cir., 400 F.2d 1, aff'd, 1969, 395 U.S. 225, 89 S.Ct. 1670, 23 L.Ed.2d 263, further relief ordered by district court, 1970, [unreported], aff'd with modifications, 5 Cir. 1970, 429 F.2d 382.

decisions by this Court and the Supreme Court since the entry in 1970 of the last comprehensive order in the case. One week later, plaintiffs-intervenors, Jenkins, et al., filed their motion to intervene, which was granted in February, 1974. During the first four months of 1974, plaintiffs, plaintiffs-intervenors, and the School Board each prepared and proposed new pupil assignment plans. Hearings were held on each plan in April. The School Board amended its plan in response to prodding from the Bench, and in an order entered May 22, 1974, and opinion reported at 377 F.Supp. 1123, the district court adopted the School Board plan, as amended, in its entirety. Costs were taxed half against the plaintiffs and half against the plaintiffs-intervenors.

The plaintiffs, the plaintiffs-intervenors, and the United States appeal, arguing between them that the district court erred in adopting the School Board's plan for the assignment of elementary and junior high school students, that the School Board assignment plan saddles black elementary school students with a disproportionate transportation burden, and that costs should have been taxed against the School Board.

I would hold that the district court should not have adopted the School Board's proposed assignment plan for the elementary grades because it fell short of establishing a unitary school system, and there was no sufficient finding that no workable alternative could be implemented. The record indicates additionally that the School Board plan for the assignment of junior high students, as implemented, fails to comply with constitutional mandates. Accordingly, I would remand to the district court for further proceedings to develop workable unitary school assignment plans for the elementary and junior high grades.

In light of this I would find it unnecessary at the time to pass on the appellants' claims of unequal transportation burdens. I would vacate the district court's award of costs in favor of the School Board, to permit the entry of an appropriate award after the further proceedings on remand.

I

Background

For the 1973-74 term, Montgomery County public schools enrolled 36,016 students, 17,042 (47%) of whom were black, and 18,974 (53%) white, in some 54 regular schools, organized along a 1-6, 7-9, 10-12 pattern. The 36 elementary schools enrolled 18,449 students (9,279, or 50%, black), the 13 junior high schools, 9,644 (4,390, or 45%, black), and the 5 high schools 7,923 (3,373, or 43%, black).[2] All but 7 of the schools then in use stood within the corporate limits of the City of Montgomery, and the total county population is similarly concentrated within the City.

The student population residing in the area of Montgomery County outside the City is predominantly black. Within the City the student population is predominantly white: the eastern half of the City is more concentratedly white; most of the western half is virtually all-black; and a narrow integrated corridor running North-South bisects the City. Under the desegregation plan adopted in 1970 and effective in 1973-74, most pupils within the City were assigned to neighborhood schools. Outside the City, school children in all but the extreme south of the county[3] were

[2] I rely here upon the figures referenced in the district court's opinion, although the plaintiffs-intervenors assign some minor inaccuracies thereto.

[3] These students attended Dunbar Elementary School (1-6), and Montgomery County High School (7-12), both of which remain virtually all-black under all plans proposed to the district court.

organized into "periphery zones." Most of these "periphery zone" students were bused to schools in the City, and they made up the majority of the 11,176 students (31%) bused by the county.[4]

Implementation of the neighborhood assignment based plan adopted in 1970 left a high number of all-one-race or virtually all-one-race schools. The record discloses that in the Spring of 1974, 15 elementary schools were 87% or more black, and 6 were 87% or more white; 6 junior highs were 94% or more black, another was 85% black, and 1 was 90% white; 1 senior high was 99% black, and another was 86% black. Responding to these conditions, in its order below the district court replaced its 1970 plan with the School Board's most current proposal. That plan adheres to the techniques employed in the 1970 plan, and, unlike the plans suggested by the plaintiffs and plaintiffs-intervenors, eschews pairing or clustering of schools.

At the high school level, the School Board plan employs rezoning and peripheral reassignments to reduce the percentages of black students at each City school to 33-48%; only Montgomery County High School, in the extreme south of the County, retains an 87% black student body.[5] None of the appellants question the propriety of this high school plan, and it requires no further discussion. Rather, this appeal was brought to test the constitutional sufficiency of the School Board's student assignment plans for the elementary and junior high levels. I will discuss each of the two educational stages in turn.

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[4] During the 1973-74 term, some 5,388 elementary school students, 3,759 junior high students, and 2,029 senior high students were bused.

[5] *See* Appendix C; *see also* note 35 *infra*.

Opinion dated April 11, 1975

II

Elementary School Plan

The plaintiffs and plaintiffs-intervenors each proposed alternative plans for assignment of elementary school students. Each plan aimed at eliminating "racially identifiable" schools, defined at the outset by each plan's architect as a school whose racial balance varied more than 10-15% from the racial make-up of the county-wide student body for that level. Neither plan clung strictly to such statistical profiles, however, and each left at least one virtually all-black elementary school.

The plaintiffs' plan was directed only toward the elementary schools within the City. It generally retained the zone lines drawn by the School Board, but changed assignment patterns within those zones through pairing and clustering, and some modification of peripheral assignments, to reach a 24-66% black concentration in each city school. The district court calculated that implementation of the plaintiffs' plan would require reassignment of 43% of the elementary school population and additional transportation of 28% of the elementary student body. The district court concluded that the plaintiffs' plan was designed "for the sole purpose of attaining a strict racial balance in each elementary school involved," 377 F.Supp. at 1129, and that the increased busing, large scale reassignment of students and teachers, and the "fracturization of grade structure" inherent in pairing and clustering, "be disruptive to the educational processes and would place an excessive and unnecessarily heavy administrative burden on the school system." *Id.*

The plaintiffs-intervenors proposed a more complicated overhaul of elementary school assignments. Their plans

abandoned the School Board zone lines, replacing them with two sets of new zones: one set of strip zones, running generally North-South, for grades 1-3; another set of strip zones, running generally East-West, for grades 4-6. Utilizing this basic network the plaintiffs-intervenors offered two possible plans. The simpler plan merely assigned students to the school within their proposed contiguous zone. This left 400 black students in grades 4-6 in a school 81% black, and 2233 of the black primary grade 1-3 children in schools 84% or more black. The plaintiffs-intervenors' alternative, and preferred, plan retained their grade 4-6 zone pattern and the single 81% black school, but added satellite zoning to the primary grade assignments, reducing to 402 the total of black students in one 84% black primary school. The plaintiffs-intervenors' plan offered transportation advantages over the plantiffs' plan, requiring additional busing for only 11% of the elementary school students, according to the district court. There was evidence that the plaintiffs-intervenors' plan would prove the more likely thwarted in practice, however, and the district court found that implementation of either of the plaintiff-intervenors' plans would involve reassignment of 60-70% of all of the elementary school population. The district court entered no specific findings as to the workability of the plaintiffs-intervenors' plans.

The School Board plan adopted by the district court for the assignment of elementary school children furthers desegregation by closing 5 previously virtually all-black elementary schools and assigning some pupils from these schools to predominantly white schools, and by reassigning some 400 black students at another virtually all-black school to 4 predominantly white schools. Under this plan, however, 55% of the black students were projected to be en-

rolled at elementary schools 87% or more black, and 44% were expected to attend elementary schools 93% or more black. The statistics showing actual enrollment as of September 15, 1974, demonstrate that the true profiles are slightly worse.[6] Under the School Board plan no white elementary school students were reassigned to a school that would remain predominantly black. The School Board estimated that its elementary school plan would produce a significant net reduction of transportation.

A

Unitary School System

As the Supreme Court established in Green v. School Bd. of New Kent County, 1968, 391 U.S. 430, 436, 88 S.Ct. 1689, 1693, 20 L.Ed.2d 716, 722, "The transition to a unitary, nonracial system of public education . . . is the ultimate end to be brought about" in school desegregation cases. In this pursuit the school authorities and district court "will . . . necessarily be concerned with the elimination of one-race schools." Swann v. Charlotte-Mecklenburg Bd. of Educ., 1971, 402 U.S. 1, 26, 91 S.Ct. 1267, 1281, 28 L.Ed.2d 554, 572. The district court, relying on Ellis v. Board of Public Instruc. of Orange County, 5 Cir. 1970, 423 F.2d 203 (*Ellis I*), concluded, however, that the persistence of virtually all-black elementary schools in Montgomery County under the School Board's "neighborhood assignment" plan did not prevent that system from reaching the unitary status mandated by *Green*. I disagree.

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[6] *See* Appendix A & note 37 *infra*.

Ellis I approved, as modified,[7] a student desegregation plan for Orange County, Florida, which was based on neighborhood school assignments and left several virtually all-black schools. We held that "[u]nder the facts of this case, it happens that the school board's choice of a neighborhood assignment system is adequate to convert the Orange County school system from a dual to a unitary system." 423 F.2d at 208, n. 7. *Ellis I* did not, however, automatically sanctify any "neighborhood school" student assignment plan which placed the same percentages of students in fully integrated schools. Rather, as we explicitly cautioned,

> There are many variables in the student assignment approach necessary to bring about unitary school systems. The answer in each case turns, in the final analysis, as here, on all of the facts including those which are peculiar to the particular system.

423 F.2d at 208, n. 7. This passage has become a refrain in our school desegregation decisions.[8] Indeed, our school desegregation cases are too numerous, their facts, figures, and conditions too particular, and our remedies too flexibly fashioned, to lend themselves to a simple sorting into neat rows. But I believe that the weight of our pre-*Swann* decisions adopting and adapting the neighborhood assignment approach of *Ellis I* do not permit us to certify the School Board's plan for Montgomery as the achievement

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[7] The district court's opinion below, 377 F.Supp. at 1137 n.36, erroneously reads the *Ellis I* opinion as approving the degree of desegregation under the Orange County plan without modification.

[8] *See, e.g.*, Henry v. Clarksdale Mun. Sep. Sch. Dist., 5 Cir. 1970, 433 F.2d 387, 390; Andrews v. City of Monroe, 5 Cir. 1970, 425 F.2d 1017, 1019.

of a unitary system.[9] As we concluded in Allen v. Board of Public Instruc. of Broward County, 5 Cir. 1970, 432 F.2d 362, "In the conversion from dual school systems based on race to unitary school systems, the continued existence of all-black or virtually all-black schools is unacceptable where reasonable alternatives exist." [10]

Even were the School Board's plan adequate to achieve a unitary school system under *Ellis I* and the cases immediately following it, however, I think it manifest that the School Board's plan cannot stand after *Swann,* Davis v. Board of School Comm'rs of Mobile County, 1971, 402 U.S. 33, 91 S.Ct. 1289, 28 L.Ed.2d 577, and Keyes v. School District No. 1, 1973, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548. *Swann* shed new light on the constitutional requisites in school desegregation cases, and since *Swann* we have refused to accept mere compliance with our decision in *Ellis I* as the mark of a school board plan's constitutional suffi-

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[9] *See, e.g.,* Ross v. Eckels, 5 Cir. 1970, 434 F.2d 1140, cert. denied, 1971, 402 U.S. 953, 91 S.Ct. 1614, 29 L.Ed.2d 123; Valley v. Rapides, 5 Cir. 1970, 434 F.2d 144; Conley v. Lake Charles School Bd., 5 Cir. 1970, 434 F.2d 35; Allen v. Board of Public Instruc. of Broward County, 5 Cir. 1970, 432 F.2d 362, cert. denied, 1971, 402 U.S. 952, 91 S.Ct. 1609, 1612, 29 L.Ed.2d 123; Pate v. Dade County School Bd., 5 Cir. 1970, 434 F.2d 1151, cert. denied, 1971, 402 U.S. 953, 91 S.Ct. 1613, 29 L.Ed.2d 123; Bradley v. Board of Public Instruc. of Pinellas County, 5 Cir. 1970, 431 F.2d 1377, cert. denied, 1971, 402 U.S. 943, 91 S.Ct. 1608, 29 L.Ed2d 111; Hightower v. West, 5 Cir. 1970, 430 F.2d 552; Mannings v. Board of Public Instruc. of Hillsborough County, 5 Cir. 1970, 427 F.2d 874. In each of these "neighborhood assignment" cases we required that the concentration of black students attending virtually all-black schools be reduced far below the level accomplished under the School Board plan for Montgomery. This is not, of course, to disregard the complex of other variables present in each case. *See also* Wright v. Board of Public Instruc. of Alachua County, 5 Cir. 1970, 431 F.2d 1200.

[10] Quoted with approval in Boykins v. Fairfield Bd. of Educ., 5 Cir. 1972, 457 F.2d 1091, 1095.

ciency. Indeed, we held Ellis v. Board of Public Instruc. of Orange County, 5 Cir. 1972, 465 F.2d 878, cert. denied, 1973, 410 U.S. 966, 93 S.Ct. 1438, 35 L.Ed.2d 700 *(Ellis II)*, that the school board was obliged to desegregate each all-black school remaining in Orange County under our prior holding.[11] *See also* Dandridge v. Jefferson Parish School Bd., 5 Cir. 1972, 456 F.2d 552, 554,[12] cert. denied, 1972, 409 U.S. 978, 93 S.Ct. 306, 34 L.Ed.2d 240.

The concentration of black students in virtually all-black schools contradicts the assertion that the School Board's plan for Montgomery establishes a unitary school system under these controlling standards. *Compare, e. g., Swann, supra; Davis, supra; Ellis II, supra;* Flax v. Potts, 5 Cir. 1972, 464 F.2d 865, 869, cert. denied, 1972, 409 U.S. 1007, 93 S.Ct. 433, 34 L.Ed.2d 299 (middle schools, high schools); Dandridge v. Jefferson Parish School Bd., 5 Cir. 1972, 456 F.2d 552, cert. denied, 1972, 409 U.S. 978, 93 S.Ct. 306, 34 L.Ed.2d 240; cases cited, note 9 *supra; see also* Keyes v. School Dist. No. 1, 1973, 413 U.S. 189, 199, n. 10, 93 S.Ct. 2686, 2692, 37 L.Ed.2d 548, 558. The teaching of *Swann* and *Keyes* is that no school which reflects vestigial discrimination through its virtually single-race student body can be omitted from a desegregation plan unless inclusion is unworkable; where desegregation is possible we can

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[11] We found the Orange County system could be unitary, however, although two elementary schools, to which 7% of the system's black elementary students were assigned, continued with 79% black enrollments, where 14% of the system's black students had employed the majority to minority transfer program.

[12] *Compare* Lee v. Macon County Bd. of Educ. (Anniston), 5 Cir. 1973, 483 F.2d 244 (post-*Swann*), *with* Lee v. Macon County Bd. of Educ. (Anniston), 5 Cir. 1970, 429 F.2d 1218 (pre-*Swann*). *But cf.* Lee v. Macon County Bd. of Educ. (Troy), 5 Cir. 1973, 475 F.2d 748 (apparently denying interim relief only).

tolerate no abandonment of some given portion of students locked into a uniracial educational experience.

In appraising a school board's plan we are, of course, attentive to conditions other than racial concentrations. I cannot agree, however, with the suggestion that compliance with the remaining five of the six requirements established in Green v. School Board of New Kent County, 1968, 391 U.S. 430, 435, 88 S.Ct. 1689, 1693, 20 L.Ed.2d 716, 722—"faculty, staff, transportation, extra-curricular activities and facilities"—can immunize the School Board's plan.[13] So to conclude would ignore that "[i]n *Green* the court spoke in terms of the whole system," *Ellis I*, 423 F.2d at 204, and would disregard the recognition that student assignment is the most important single aspect of a desegregated school system. Our cases have always required compliance with all six particulars.[14] The School Board additionally argues that the secondary schools in Montgomery County are desegregated, and points out that we have taken note of thorough integration at the secondary level, in some cases approving assignment plans which left some all-black primary schools. *See* Lee v. City of Troy Bd.

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[13] *See* 377 F.Supp. at 1138. I assume *arguendo* that the Board plan complies with the remaining five benchmarks enumerated in *Green*.

[14] *See, e.g., Ellis II, supra;* Valley v. Rapides, 5 Cir. 1970, 434 F.2d 144; Allen v. Board of Public Instruc. of Broward County, 5 Cir. 1970, 432 F.2d 362, cert. denied, 1971, 402 U.S. 952, 91 S.Ct. 1609, 1612, 29 L.Ed.2d 123; Pate v. Dade County School Bd., 5 Cir. 1970, 434 F.2d 1151, cert. denied, 1971, 402 U.S. 953, 91 S.Ct. 1613, 29 L.Ed.2d 123; Henry v. Clarksdale Mun. Sep. School Dist., 5 Cir. 1970, 433 F.2d 387; Bradley v. Board of Public Instruc. of Pinellas County, 5 Cir. 1970, 431 F.2d 1377, cert. denied, 1971, 402 U.S. 943, 91 S.Ct. 1608, 29 L.Ed.2d 111; City of Monroe v. Andrews, 5 Cir. 1970, 425 F.2d 1017. *See generally* Singleton v. Jackson Mun. Sup. School Dist., 5 Cir. (en banc) 1970, 419 F.2d 1211.

of Educ., 5 Cir. 1970, 432 F.2d 819, 822; Hightower v. West, 5 Cir. 1970, 430 F.2d 552, 555. This argument also fails here. Even assuming *arguendo* that the secondary schools in Montgomery County were fully integrated, we would as in the pre-*Swann* cases relied upon by the School Board, attach little weight to that consideration. Moreover, as it has become quite clear, "[T]his court has, with limited exceptions [not applicable here] disapproved of school board plans which exclude a certain age grouping from school desegregation." Arvizu v. Waco Indep. School Dist., 5 Cir. 1974, 495 F.2d 499, 503.[15] In the light of *Swann* and our developed case law, it is manifest that the progressive integration of Montgomery's high schools is no excuse for the continued failure to desegregate at the elementary level.[16]

In sum, a neighborhood school assignment plan may be adequate if it establishes a unitary school system; but such assignment is not "per se adequate." Davis v. Board of School Comm'rs of Mobile County, 1971, 402 U.S. at 37, 91 S.Ct. at 1292, 28 L.Ed.2d at 581. A review of the circumstances of the Montgomery County system, particularly

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[15] In some cases it may prove necessary to avoid transportation of school children of very tender age, *see generally Swann*, 402 U.S. at 31, 91 S.Ct. at 1283, 28 L.Ed.2d at 575; Cisneros v. Corpus Christi Indep. School Dist., 5 Cir. (en banc) 1972, 467 F.2d 142, 153, cert. denied, 1973, 413 U.S. 922, 93 S.Ct. 3052, 37 L.Ed.2d 1044. But such exceptions are carefully limited, *see, e.g.*, Flax v. Potts, 5 Cir., 1972, 464 F.2d 865, 869, cert. denied, 1972, 409 U.S. 1007, 93 S.Ct. 433, 34 L.Ed.2d 299; Lockett v. Board of Educ. of Muscogee County School Dist., 5 Cir. 1971, 447 F.2d 472, 473; *cf.* Lee v. Macon County Bd. of Educ., 5 Cir. 1973, 475 F.2d 748 (apparently denying interim relief only).

[16] In cases where racially identifiable primary schools cannot feasibly be eradicated, of course, a district court should endeavor particularly to insure that students from such schools will graduate to fully integrated schools.

the concentration of black elementary students in virtually all-black schools, reveals that the School Board plan approved by the district court was insufficient to achieve a unitary school system as required under *Green* and *Swann*. Such a plan can stand only if its lack of unitary status is not attributable to state action, or if no further remedy is workable.

B

Residential Patterns

The district court declined to require further desegregation of the remaining virtually all-black elementary schools in Montgomery County, in part because it considered the persistence of those schools to be "a result of residential patterns and not of the school board's action—either past or present." 377 F.Supp. at 1132. Because the district court's opinion offers no supporting discussion, it is unclear whether the district court believed that the present existence of virtually all-black schools could be laid in part to residential patterns established during the period of statutory school segregation yet not induced by that state action, or that the development of racially identifiable neighborhoods since the onset of efforts to integrate the schools had precipitated the virtually all-black schools.[17] In either event, I think the district court erred in its legal determination.

Aware that "[p]eople gravitate toward school facilities, just as schools are located in response to the needs of people," the Supreme Court has recognized that

[17] The record discloses that of the 11 elementary schools which retain a projected black population over 80% under the School Board's "neighborhood assignment" plan, 8 (all but Bellinger Hill, Davis, and Pintlala) had been black schools before 1970.

> [t]he location of schools may . . . influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods.
>
> In the past, choices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system.

Swann, 402 U.S. at 20, 21, 91 S.Ct. at 1278, 28 L.Ed.2d at 569.

Moreover,

> [A] connection between past segregative acts and present segregation may be present even when not apparent and . . . close examination is required before concluding that the connection does not exist. Intentional school segregation in the past may have been a factor in creating a natural environment for the growth of further segregation.

Keyes, 413 U.S. 189, 211, 93 St.Ct. 2686, 2699, 37 L.Ed.2d 548, 565.

Accordingly, the *Swann* Court held that while

> the existence of some small number of one-race, or virtually one-race, schools within a district is not in and of itself the mark of a system that practices segregation by law [,] . . . in a system with a history of segregation the need for remedial criteria of sufficient specificity to assure a school authority's compliance with its constitutional duty warrants a presumption against schools that are substantially disproportionate in their racial composition. Where the school authority's proposed plan for conversion from a dual to a unitary system contemplates the continued existence of some schools that are all or predominantly of one

> race, they have the burden of showing that such assignments are genuinely nondiscriminatory. The court should scrutinize such schools, and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.

Swann, 402 U.S. at 26, 91 S.Ct. at 1281, 28 L.Ed.2d at 572. The School Board may satisfy its burden "only by showing that its past segregative acts did not create or contribute to the current segregated condition of . . . [particular] schools." *Keyes,* 413 U.S. at 211, 93 S.Ct. at 2699, 37 L.Ed.2d at 565.

There is no evidence to support a conclusion that the existence of virtually all-black neighborhood elementary schools, so far as they derive from residential patterns etched before school desegregation, is innocent of past discriminatory action by the School Board. The opinion below lacks the detailed factual findings by the district court which should reflect the "close scrutiny" required under *Swann* and *Keyes,* and the record bears no evidence to support the conclusion that the link between past and present segregation has been severed. While there is much evidence of the residential separations between whites and blacks in Montgomery, which in some cases shows that those patterns are not new, evidence of this sort is insufficient to overcome the presumption established in *Swann* connecting the development of persistently segregated residential patterns with state-mandated school segregation. *See also* Dandridge v. Jefferson Parish School Bd., 5 Cir. 1972, 456 F.2d 552, cert. denied, 1972, 409 U.S. 978, 93 S.Ct. 306, 34 L.Ed. 240.

These principles establish equally well that racial segregation in the Montgomery County elementary schools can-

not be excused on the ground that segregated residential patterns of some neighborhoods from which the one-race neighborhood schools draw have crystallized as the result of population shifts by private residents since the court's initiation of school desegregation. Such an argument has previously been rejected by this Court.[18] To be sure, the Supreme Court has made clear that after a school system attains unitary status,

> the communities served by such [a system may not] remain demographically stable [;] . . . in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system.

Swann, 402 U.S. at 31-32, 91 S.Ct. at 1283, 28 L.Ed.2d at 575.

But in Montgomery a unitary system has never been achieved, for "[t]he vestiges of state-imposed segregation [have not] been eliminated from the assignment of elementary school students," Flax v. Potts, 5 Cir. 1972, 464 F.2d 865, 868, cert. denied, 1972, 409 U.S. 1007, 93 S.Ct. 433, 34 L.Ed.2d 299, as required under *Swann.*[19]

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[18] *See* Flax v. Potts, 5 Cir. 1972, 464 F.2d 865, 868, cert. denied, 1972, 409 U.S. 1007, 93 S.Ct. 433, 34 L.Ed.2d 299; *cf.* Boyd v. Pointe Coupee Parish School Bd., 5 Cir. 1974, 505 F.2d 632; Hereford v. Huntsville Bd. of Educ., 5 Cir. 1974, 504 F.2d 857; Adams v. Rankin, 5 Cir. 1973, 485 F.2d 324.

[19] *Cf.* Ellis v. Board of Public Instruc. of Orange County, 5 Cir. 1972, 465 F.2d 878, 879-80, cert. denied, 1973, 410 U.S. 966,

C

Remedy

Because the School Board's proposed elementary school plan falls short of achieving a unitary system, and this failing cannot be attributed solely to private action, the district court should have ordered an appropriate alternative plan. As we have said before *Swann* and reiterated after, "[i]n the conversion from dual school systems based on race to unitary school systems, the continued existence of all-black or virtually all-black schools is unacceptable where reasonable alternatives exist." [20]

The district court discarded the plans proposed by the plaintiffs and plaintiffs-intervenors, after determining that they aimed at balancing black/white student populations on abstract ratios, rather than simply creating a unitary assignment plan. Although the plaintiffs and plaintiffs-intervenors protest that their use of ratios as indicators of residually discriminatory school assignments remained

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93 S.Ct. 1438, 35 L.Ed.2d 700 (*Ellis II*); Dandridge v. Jefferson Parish School Bd., 5 Cir., 1972, 456 F.2d 552, 554, cert. denied, 1972, 409 U.S. 978, 93 S.Ct. 306, 34 L.Ed.2d 240. Moreover, there is even some indication of Montgomery County School Board action since the onset of court-ordered desegregation which may tend to perpetuate the dual system. As the district court found at a prior stage in this litigation, the location and extent of construction and expansion of elementary and secondary schools in Montgomery County have "been designed to perpetuate, and have the effect of perpetuating, the dual school system." Carr. v. Montgomery County Bd. of Educ., M.D.Ala. 1968, 289 F.Supp. 647, 652. *See generally, Swann*, 402 U.S. at 18-21, 91 S.Ct. at 1277, 28 L.Ed.2d at 568-70; *cf. Keyes*, 413 U.S. at 201-05, 93 S.Ct. at 2694-2695, 37 L.Ed.2d at 559-61.

[20] Allen v. Board of Educ. of Broward County, 5 Cir. 1970, 432 F.2d 362, 367, cert. denied, 1971, 402 U.S. 952, 91 S.Ct. 1609, 1612, 29 L.Ed.2d 123, *quoted in* Boykins v. Fairfield Bd. of Educ., 5 Cir. 1972, 457 F.2d 1091, 1095.

within the bounds approved by the Supreme Court in *Swann*, 402 U.S. at 22-25, 91 S.Ct. at 1279-1280, 28 L.Ed.2d at 570-72, I would not hold that the district court abused its discretion in choosing not to follow those plans. Nevertheless, the elimination of those proposals did not relieve the district court of its duty to exercise its "broad power to fashion a remedy that will assure a unitary school system," and to "make every effort to achieve the greatest possible degree of actual desegregation and . . . [eliminate] one-race schools." *Swann*, 404 U.S. at 16, 26, 91 S.Ct. at 1281, 28 L.Ed.2d at 567, 572. Upon determining that none of the alternatives presented was satisfactory, the district court should have held further proceedings to forge a workable and effective plan. *See* Cisneros v. Corpus Christi Indep. School Dist., 5 Cir. (en banc) 1972, 467 F.2d 142, 152, cert. denied, 1973, 413 U.S. 922, 93 S.Ct. 3052, 37 L.Ed.2d 1044. The district court should support its failure so to proceed only by a conclusion that no further desegregation of the elementary school population was workable on any plan.

The School Board has consistently maintained that no workable means exists for increasing desegregation in the elementary schools, and the district court agreed, finding "that the remaining predominantly black schools cannot be effectively desegregated in 'a practical and workable manner' and that the School Board plan achieved 'the greatest possible degree of actual desegregation, taking into account the 'practicalities of the situation.'" 377 F. Supp. at 1135. These conclusions are drawn on insufficient or improper factual considerations, however, and are thus inadequate as a matter of law.

The district court reasoned that any further elementary school desegregation would require cross-busing of black and white students which "would not, under the circum-

stances of this case, accomplish any realistically stable desegregation." 377 F.Supp. at 1132.[21] The opinion carries no discussion or subsidiary findings to explain its concern with the stability of desegregation. Apparently the district court was persuaded by the School Board's attempt[22] to demonstrate that busing of white children into black neighborhoods to attend traditionally black schools would in many cases be met with withdrawal of white students from those schools. But it is well settled that the threat of "white flight," however likely, cannot validate an otherwise insufficient desegregation remedy.[23] To the extent that it considered white flight as a factor requiring the moderation of desegregation otherwise to be ordered, the district court was in error.

The opinion below does not sufficiently explicate the remaining factors (other than stability) that the district court appraised and the reasoning it followed in determining that no further elementary school desegregation was feasible beyond that suggested by the School Board. The district court simply specified the totals of children to be reassigned and the number of students to be newly

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[21] The district court also forecast that the plans of the plaintiffs and plaintiffs-intervenors would provide only "an extremely unstable desegregated system." 377 F.Supp. at 1131.

[22] *See, e.g.*, Transcript, April 24, 1974, at 240.

[23] *See, e.g.*, Monroe v. Board of Commissioners of City of Jackson, 1968, 391 U.S. 450, 459, 88 S.Ct. 1700, 1704, 20 L.Ed.2d 733, 739; Lee v. Macon County Bd. of Educ. (Marengo), 5 Cir. 1972, 465 F.2d 369; United States v. Hinds County School Bd., 5 Cir. 1969, 417 F.2d 852, 858, cert. denied, 1970, 396 U.S. 1032, 90 S.Ct. 612, 24 L.Ed.2d 531; Lee v. Macon County Bd. of Educ. (Pickens), M.D.Ala. (3 judge) 1970, 317 F.Supp. 95, 98-99. *Cf., e.g.*, Boyd v. Pointe Coupee Parish School Bd., 5 Cir. 1974, 505 F.2d 632; Hereford v. Huntsville Bd. of Educ., 5 Cir. 1974, 504 F.2d 857; Adams v. Rankin, 5 Cir. 1973, 485 F.2d 324.

bused under the plaintiffs' and plaintiffs-intervenors' plans; observed without any specific findings that busing would involve a substantial increase in the time and distance that students would have to travel to school; and then concluded that the plaintiffs'—but not the plaintiffs-intervenors'—plan "would be disruptive to the educational processes and would place an excessive and unnecessarily heavy administrative burden on the school system." These findings are an inadequate foundation on which the rest either a determination of the unworkability of the proposed plans or a conclusion that no improvement of the Board's solution could be obtained. Nor does the face of the record reveal any inherent obstacle to the progress of all further desegregation in Montgomery through the instruments of zoning, pairing, and busing. Each of these tools has been approved in *Swann*, 402 U.S. at 27-29, 91 S.Ct. at 1281-82, 28 L.Ed.2d at 573-74, and Cisneros v. Corpus Christi Indep. School Dist., 5 Cir. (en banc) 1972, 467 F.2d 142, 152-53, cert. denied, 1973, 413 U.S. 922, 93 S.Ct. 3052, 37 L.Ed.2d 1044, and repeatedly utilized in this circuit.

We have, where necessary, required both rezoning[24] and pairing or clustering;[25] and while pairing may not be the

[24] *See, e.g.*, Conley v. Lake Charles School Bd., 5 Cir. 1970, 434 F.2d 35, 39-41; Valley v. Rapides Parish School Bd., 5 Cir. 1970, 434 F.2d 144, 147; Pate v. Dade County School Bd., 5 Cir. 1970, 434 F.2d 1151, 1158, cert. denied, 1971, 402 U.S. 953, 91 S.Ct. 1613, 29 L.Ed.2d 123; Bradley v. Board of Public Instruc. of Pinellas County, 5 Cir. 1970, 431 F.2d 1377, 1381-83, cert. denied, 1971, 402 U.S. 943, 91 S.Ct. 1608, 29 L.Ed.2d 111. *See also* Wright v. Board of Public Instruc. of Alachua County, 5 Cir. 1970, 431 F.2d 1200.

[25] *See, e.g.*, Weaver v. Board of Public Instruc. of Brevard County, 5 Cir. 1972, 467 F.2d 473, cert. denied, 1973, 410 U.S. 982, 93 S.Ct. 1498, 36 L.Ed.2d 177; Flax v. Potts, 5 Cir. 1972, 464 F.2d 865, 868-69, cert. denied, 1972, 409 U.S. 1007, 93 S.Ct. 433, 34 L.Ed.2d 299; Ross v. Eckels, 5 Cir. 1970, 434 F.2d 1140,

remedy of first resort,[26] we have said and repeated that "where all-black or virtually all-black schools remain under a zoning plan, but it is practicable to desegregate some or all of the black schools by using the tool of pairing, the tool must be used."[27] The record, insofar as it reveals the administrative practicalities associated with rezoning and pairing or clustering, does not appear to preclude the imposition of all measures beyond those desired by the School Board. The record fails to indicate in any way how Montgomery's situation differs from the conditions existing in any of the many other school districts in which we have specified that these measures be employed. Indeed, examination of the record suggests the feasibility of their utilization in several instances.[28] Accordingly, I would hold

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1148, cert. denied, 1971, 402 U.S. 953, 91 S.Ct. 1614, 29 L.Ed.2d 123; Henry v. Clarksdale Mun. Sep. School Dist., 5 Cir. 1970, 433 F.2d 387, 394-95; Allen v. Board of Public Instruc. of Broward County, 5 Cir. 1970, 432 F.2d 362, 367-71 (citing additional cases), cert. denied, 1971, 402 U.S. 952, 91 S.Ct. 1609, 1612, 29 L.Ed.2d 123. *See also* Miller v. Board of Educ. of Gadsden, 5 Cir. 1973, 482 F.2d 1234; Boykins v. Fairfield Bd. of Educ., 5 Cir. 1972, 457 F.2d 1091, 1095; Andrews v. City of Monroe, 5 Cir. 1970, 425 F.2d 1017, 1021.

[26] Allen v. Board of Public Instruc. of Broward County, 5 Cir. 1970, 432 F.2d 362, 367, cert. denied, 1971, 402 U.S. 952, 91 S.Ct. 1609, 29 L.Ed.2d 123, *quoted in* Flax v. Potts, 5 Cir. 1972, 464 F.2d 865, 868, cert. denied 1972, 409 U.S. 1007, 93 S.Ct. 433, 34 L.Ed.2d 299, and Boykins v. Fairfield Board of Educ., 5 Cir. 1972, 457 F.2d 1091, 1095.

[27] *See* Cisneros v. Corpus Christi Indep. School Dist., 5 Cir. (en banc) 1972, 467 F.2d 142, 153, cert. denied, 1973, 413 U.S. 922, 93 S.Ct. 3052, 37 L.Ed.2d 1044; Conley v. Lake Charles School Bd., 5 Cir. 1970, 434 F.2d 35, 39.

[28] In regard to the initial administrative difficulties associated with re-zoning and pairing, we emphasize "[t]he fact that a temporary, albeit difficult, burden may be placed on the School Board in the initial administration of the plan . . . does not justify in these circumstances the continuation of a less than

that the district court erred in approving the School Board plan, and remand the cause for implementation of a constitutionally sufficient plan.

The district court entered no specific findings regarding the extent in time or miles[29] of additional busing required to implement any of the desegregation plans before it, nor did it express any conclusions as to whether "the time or distance of travel [under any possible plan was] so great as to either risk the health of the children or significantly impinge on the educational process." *Swann*, 402 U.S. at 30-31, 91 S.Ct. at 1283, 28 L.Ed.2d at 575. Certainly it is clear that the School Board plan employs less than the maximum busing possible, since it anticipates a significant reduction in elementary school student busing in the year of implementation. Accordingly, I would direct that in analyzing remedies for desegregation of the Montgomery schools on remand, the district court should consider the implementation of additional busing as necessary to accomplish new zoning, pairing, or clustering.[30]

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unitary school system and the resulting denial of an equal educational opportunity to a certain segment of the [County] children." Dandridge v. Jefferson Parish School Bd., E.D.La. 1971, 332 F.Supp. 590, 592, stay denied, 1971, 404 U.S. 1219, 92 S.Ct. 18, 19, 30 L.Ed.2d 23, 24 (Marshall, J., in chambers; quoting cited language with approval), aff'd, 5 Cir. 1972, 456 F.2d 552, cert. denied, 1972, 409 U.S. 978, 93 S.Ct. 306, 34 L.Ed.2d 240.

[29] *See* Cisneros v. Corpus Christi Indep. School Dist., 5 Cir. 1972, 467 F.2d 142, 153, cert. denied, 1973, 413 U.S. 922, 93 S.Ct. 3052, 37 L.Ed.2d 1044.

[30] Significantly, the extent—in terms of the number of pupils involved, and apparently the length of the trips—of additional elementary student busing envisioned in connection with the plaintiffs'-intervenors' plan very closely parallels the increase in elementary school busing under the desegregation plan implemented in *Swann*, as reflected in the opinions in the Supreme Court, 402 U.S. at 29-31, 91 S.Ct. at 1282-1283, 28 L.Ed.2d at 574-75, and the Fourth Circuit, 1970, 431 F.2d 138, 144-47.

To summarize, I would hold that the district court erred in adopting the School Board plan, because that plan falls short of the constitutional mark, and because there is no indication of the unworkability of a Constitutional remedy. I do not believe the district court's result can be upheld on any of the arguments advanced, whether independently or cumulatively considered. If there be no other way to desegregate, the tools of pairing and clustering must be used to relieve the barricaded and beleaguered blacks from their school garrisons. These mixing mechanisms have received judicial blessing, and they must be employed unless manifestly unusable for constitutional reasons. Other innovations may be considered. Nothing to achieve the constitutional mandate to desegregate can be avoided because of whimsy, white flight and fright, inconvenience, annoyance or any other actual or conjured excuse. Desegregation of education is a constitutional necessity and not an optional luxury, and bland generalities will not suffice to justify segregated schools.

I would be unwilling to require the immediate implementation of any of the alternative elementary school plans presented, however, in light of the district court's determination that the plans of the plaintiffs and plaintiffs-intervenors were generated to achieve racial ratios beyond and in contravention of the mandate of *Swann*, in light of the state of the record, and in light of the opportunity remaining for the district court to refine and meld the various plans before it.[31] Rather I would remand the case to the district court for further proceedings to develop a proper plan. We have in the past required specific and detailed

[31] *Cf.* Adams v. Rankin County Bd. of Educ., 5 Cir. 1973, 485 F.2d 324, 326; Andrews v. City of Monroe, 5 Cir., 1970, 425 F.2d 1017, 1021.

findings to accompany the district court's selection of a desegregation remedy that promises to be less effective than alternative plans for establishing a unitary school system.[32] This requirement is meant to secure to the reviewing court the full advantages of the factual appraisals and perspective of the particularly well-situated trial court, in order to maximize the benefits of the district court's informed discretion. *Cf.* Brown v. Board of Educ. of Topeka, 1955, 349 U.S. 294, 299-300, 75 S.Ct. 753, 755-756, 99 L.Ed. 1083, 1105-06 (*Brown II*). Thus I would direct that, if the district court should approve on remand a plan less than fully effective in establishing a unitary school system in Montgomery County, it must support its conclusion with precise and detailed findings of fact, keeping in mind *Swann's* heavy burden upon school officials to legitimate any less than thorough desegregation plan on grounds of unworkability:[33]

> All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but

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[32] *See, e.g.*, Adams v. Rankin County Bd. of Educ., 5 Cir. 1973, 485 F.2d 324, 326; Boykins v. Fairfield Bd. of Educ., 5 Cir. 1972, 457 F.2d 1091, 1097; Andrews v. City of Monroe, 5 Cir. 1970, 425 F.2d 1017, 1021; *cf. also*, Winston-Salem/Forsyth County Bd. of Educ., 1971, 404 U.S. 1221, 1226-27, 92 S.Ct. 1236, 1239, 31 L.Ed. 2d 441, 446 (Burger, C. J., in chambers).

[33] *See also* Green v. School Bd. of New Kent County, 1968, 391 U.S. 430, 439, 88 S.Ct. 1689, 1695, 20 L.Ed.2d 716, 724.

> all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school system.

402 U.S. at 28, 91 S.Ct. at 1282, 28 L.Ed.2d at 573. Many practicalities affect the judgment and aims of school authorities in pursuing their daily occupation of maintaining a pragmatic educational system. But when the constitutionally mandated establishment of a unitary school system rests in the balance, workaday practicalities are no longer determinative factors. The conservation of such daily efficiencies may have been a considered objective in the days of Plessy v. Ferguson, 1896, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256, but Brown v. Board of Educ. of Topeka, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (*Brown I*), has taken us down a new road. *Brown* and its post-adolescent progeny have imposed upon school authorities and courts an affirmative duty to see that such stumbling blocks in the path of desegregation are relegated to a footnote in history. As we observed in a prior *Montgomery* case,[34] "This obligation is unremitting, and there can be no abdication, no matter how temporary." A school board's plan may have any number of advantages when appraised in ordinary perspective, but these give way where they impede the progress of desegregation; convenience as well as custom must bend to constitutional prescription.

Given my resolution of this aspect of the attack on the School Board's plan for the elementary grades, I would find it unnecessary to consider at this time whether that plan imposes a discriminatorily harsh burden on the black students.

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[34] Carr v. Montgomery County Bd. of Educ., 5 Cir. 1970, 429 F.2d 382, 386.

Opinion dated April 11, 1975

III

Junior High School Plan

The junior high school student assignment plan in effect in the Spring of 1974 left over half of the black students in 7 junior high schools which were over 85% black. The School Board plan, as implemented by the district court, proposed to reduce this concentration through rezoning, peripheral reassignments, and the elimination of three black schools; the district court projected that McIntyre Junior High, enrolling 792 of the County's black junior high students (18%) would remain the only junior high facility[35] more than 80% black under the School Board plan.

Both the plaintiffs and plaintiffs-intervenors submitted alternative plans for desegregation at the junior high level. The plaintiffs proposed to modify the basic School Board plan through additional busing to achieve a closer racial balance at McIntyre and two other junior high schools left substantially black under the Board plan, Bellingrath and Baldwin. The plaintiffs-intervenors projected a 65% black student body at McIntyre, and a less than 60% black enrollment at each of 8 other junior high schools within the

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[35] The district court's opinion, following the style of the School Board plan, treats the some 252 (233 black, 19 white) junior high school students in attendance at the Montgomery County High facility as senior high school students. The apparent premise to this treatment is that "[i]t is conceded by all parties that Montgomery County High School . . . cannot be effectively desegregated because of its isolation." 377 F.Supp. at 1138, n. 37. This conclusion is not contested here, although the plaintiffs-intervenors' plan did propose to reduce the junior high class at Montgomery County High from 92% to 82% black. My figures follow the style of the district court.

City, under a plan of new elongated but continuous strip zones, with transportation to be provided within each zone where necessary. In adopting the School Board plan for the junior high schools, the district court dismissed these alternative proposals as too inflexibly wedded to abstract racial balancing, and suggested that they were unfeasible. Emphasizing the isolation of McIntyre as the only virtually all-black junior high remaining under the School Board plan, the district court held that "under the circumstances that exist in the Montgomery school system" no further requirement of desegregation could be imposed upon the County. 377 F.Supp. at 1139.[36]

Unfortunately, the data revealing the actual desegregation at the junior high schools accomplished under the School Board plan, as of September 15, 1974, show that "the circumstances" have changed.[37] False to predictions,

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[36] The district court found that the plaintiffs' proposed plan would require reassignment of 36% of the junior high student body, and additional transportation of about 17%; the plaintiffs-intervenors' plan was forecast to require reassignment of 50-60% and additional busing of some 20%. (The plaintiffs-intervenors assert that the opinion below is clearly erroneous in its computation of busing required under their junior high plan; I would not pass on the issue at this time.) The district court did not enter any findings regarding the proportion of students reassigned, projected to be reassigned, or newly transported under the School Board plan. Nor does the opinion below reveal any specific conclusions regarding the significance of the burdens in reassigning or transporting additional students, except that the McIntyre facility "is impossible to effectively desegregate in a stable and workable manner." 377 F.Supp. at 1132.

[37] *See* Appendix B. The actual enrollment figures as of September 15, 1974, are taken from the School Board's October 1, 1974, report to the District Court, per that court's order. These figures are not challenged by any other parties. *See* Davis v. Board of School Comm'rs of Mobile County, 1971, 402 U.S. 33, 37, 91 S.Ct. 1289, 1291, 28 L.Ed.2d 577, 580. This data is utilized in Appendices A, B, and C.

the student body at McIntyre Junior High is 98% black, Baldwin is 85% black, and Bellingrath is, as I compute it,[38] 81% black. Thus, more than a quarter of the black junior high school students in the City[39] are locked in schools 85% or more black, and nearly 40% in schools 80% or more black.

I would not pass now on the academic question of the acceptability of the School Board plan as proposed and implemented by the district court. It is now clear that the School Board plan has been unsuccessful, *as implemented*, in accomplishing desegregation at the junior high level,[40] and there is no indication on the record that the present circumstances are beyond remedy. As the previous discussion of the elementary school plan should make clear, the School Board plan for the junior high schools cannot

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[38] The actual enrollment figures for Bellingrath, as of September 15, 1974, are estimations. According to the district court's opinion, projected attendance at the Bellingrath facility was to be 215 (115 black, 100 white) at the elementary level and 1049 (659 black, 390 white) at the junior high level. Actual enrollment as of September 15, 1974, listed by the School Board is a combined total of 911 (681 black, 230 white) students; no breakdown is given as to grade levels.

The total actual attendance at Bellingrath is considerably lower than the total projected attendance. The net over-projection is 93 black students (12% of projection), and 260 white students (53% of projection). In estimating actual attendance, I have, conservatively, attributed the total decrease to the junior high level, where the enrollment was projected to be 62% black, and for which the zone was to be significantly shifted for 1974-75. I would, of course, direct that on remand the district court proceed to determine the actual enrollment figures with certainty.

[39] These percentages do not include the junior high students at the Montgomery County Senior High facility. *See* note 35 *infra*.

[40] *Cf., e.g.*, Boyd v. Pointe Coupee Parish School, 5 Cir. 1974, 505 F.2d 632; Hereford v. Huntsville Bd. of Educ., 5 Cir. 1974, 504 F.2d 857; Adams v. Rankin County Bd. of Educ., 5 Cir. 1973, 485 F.2d 324, 325-26.

stand as it appears, unless improvement is unworkable. The record does not suggest what remedial plan might be employed at this stage. I would leave that difficulty for resolution by the district court, following whatever further proceedings it might find to be necessary. I would emphasize again, however, that the district court's order should be accompanied with supporting findings and conclusions of sufficient precision and detail to fully apprise a reviewing court of its reasons and understanding.

IV

Conclusion

We deal here with a school system whose roots were segregated by law. There is no indication that those roots have withered away, and that the racial separation in the present system is anything but the fruit of a tainted crop. The School Board still plans to cultivate its gardens separately; and it does not promise ever to integrate in any future season. Rather, its plan guarantees perennial one-race educational experiences for over a third of the black students within its elementary and junior high schools. Desegregation is not impossible in Montgomery. It might be uncomfortable, expensive, disturbing, or even disconcerting. But these words are not amendments to the Fourteenth Amendment's commands. Much progress has been made in Montgomery school desegregation, but medals earned for past performance cannot justify contemporary failure. I am confident that our respected, scholarly, and courageous trial judge did not hesitate to apply the law correctly as he saw it to the facts before him in Montgomery. I firmly believe, however, that that view of the

law is erroneous and in conflict with previous decisions of the Court and the Supreme Court of the United States.

I would reverse the order of the district court insofar as it adopts and implements the School Board plans for elementary and junior high schools in Montgomery County, and remand the cause for such further proceedings as would be necessary to bring Montgomery County to a unitary system. In order to permit the district court to reconsider its award of costs against the plaintiffs and plaintiffs-intervenors in light of further proceedings, I would vacate the judgment awarding costs in favor of the School Board.

Opinion dated April 11, 1975

APPENDIX A

Adoption of the School Board plan produces the following profiles of the elementary school student bodies:

School	Normal Capacity	Projected Enrollment			Actual Enrollment 9/15/74[a]		
		Black	White	% Black	Black	White	% Black
Bear	630	186	505	27%	185	407	31%
Bellinger Hill	300	186	43	81%	211	35	86%
Bellingrath	1,230[b]	115	100	53%	115[c]	100[c]	53%
B. T. Washington	420	255	4	98%	232	5	98%
Capitol Hgts.	570	119	192	38%	112	178	39%
Carver	780	421	2	99%	411	5	99%
Catoma	240	63	154	29%	54	153	26%
Chisolm	810	326	555	37%	376	505	43%
Crump	990	263	703	27%	246	745	25%
Daisy Lawrence	720	445	7	98%	403	8	98%
Dalraida	630	153	423	26%	143	421	25%
Dannelly	780	236	484	32%	254	512	33%
Davis	630	615	91	87%	637	45	93%
Dunbar	660	340	51	87%	328	34	91%
Fews	720	640	3	99%	641	3	100%
Flowers	780	169	573	23%	170	533	24%
Floyd	1,350[b]	148	319	32%	135[d]	275[d]	33%
Forest Ave.	480	172	262	40%	160	283	36%
Harrison	750	184	427	30%	255	357	42%
Hayneville Rd.	1,200	669	30	95%	705	21	97%
Head	690	148	415	26%	111	339	25%
Highland Ave.	390	115	272	30%	118	237	33%
Highland Gardens	1,020	335	551	38%	310	513	38%
Johnson	660	175	550	24%	168	527	24%
Loveless	1,140	902	5	99%	876	6	99%
MacMillan	390	205	109	65%	195	75	72%
Morningview	600	134	486	22%	110	427	20%
Paterson	810	566	34	94%	550	36	94%
Peterson	600	175	299	37%	149	322	32%
Pintlala	270	204	16	93%	196	4	98%
Southlawn	600	223	492	31%	260	427	38%
Eastern By-Pass	---	149	589	20%	149[e]	589[e]	20%
Vaughan Rd.	750	183	409	32%	199	519	27%
Total		9,224	9,160	50%	9,164	8,676	51%

Opinion dated April 11, 1975

APPENDIX B

Adoption of the School Board plan produces the following profiles of the junior high school student bodies:

School	Normal Capacity	Projected Enrollment Black	Projected Enrollment White	Projected Enrollment % Black	Actual Enrollment 9/15/74 [a] Black	Actual Enrollment 9/15/74 [a] White	Actual Enrollment 9/15/74 [a] % Black
Baldwin	780	290	107	73%	275	48	85%
Bellingrath	1,230 [b]	659	390	62%	566 [c]	130 [c]	81%
Capt. Hgts.	1,200	442	730	38%	345	742	32%
Carver	660	350	545	39%	354	538	40%
Cloverdale	1,170	437	875	33%	476	891	35%
Floyd	1,350 [b]	288	541	35%	264 [d]	467 [d]	36%
G. Washington	1,290	357	782	31%	409	904	31%
Goodwyn	1,500	540	1,031	34%	564	917	38%
Houston Hill	570	210	383	35%	248	307	45%
McIntyre	1,500	792	14	98%	881	15	98%
Montgomery Cty High [f]	—	—	—	—	—	—	—
Total		4,365	5,398	45%	4,382	4,959	47%

APPENDIX C

Adoption of the School Board plan produces the following profiles of the senior high school student bodies:

School	Normal Capacity	Projected Enrollment Black	Projected Enrollment White	Projected Enrollment % Black	Actual Enrollment 9/15/74 [a] Black	Actual Enrollment 9/15/74 [a] White	Actual Enrollment 9/15/74 [a] % Black
Carver Sr.	1,100	439	660	39%	610	673	48%
Jeff. Davis Sr.	2,100	868	1,426	38%	857	1,443	37%
Lanier Sr.	2,250	817	1,068	43%	677	801	46%
Lee Sr.	2,300	929	1,560	37%	815	1,650	33%
Montgomery Cty High [f]	570	399	63	86%	390	57	87%
Total		3,452	4,777	42%	3,349	4,630	42%

Footnotes to Appendices

[a] See note 37.

[b] These figures represent normal capacity for combined elementary and junior high grades.

[c] Estimated figures. For their computation see note 38.

[d] Estimated figures. According to the district court's opinion projected attendance at the Floyd facility was to be 467 (148 black, 319 white) at the elementary level, and 829 (288 black, 541 white) at the junior high level. Actual enrollment listed by the School Board is a combined total of 1141 (399 black, 742 white) students; no break-down is given as to grade levels. For sake of simplicity, in estimating actual enrollment I have simply reduced the projected enrollments of students at both levels proportionally, according to projected and actual enrollments, by race. I would, of course, direct that on remand the district court should proceed to determine the actual enrollment figures with certainty.

[e] Projected figures. No actual figures given.

[f] See note 37.

Opinion dated June 27, 1975

ARLAM CARR, JR., a minor by Arlam Carr and Johnnie Carr, etc., *et al.*,

Plaintiffs-Appellants,

NATIONAL EDUCATION ASSOCIATION, INC.,

Intervenor,

PENELOPE ANNE JENKINS, ET AL.,

Intervenors-Appellants,

v.

MONTGOMERY COUNTY BOARD OF EDUCATION, ET AL., ETC.,

Defendants-Appellees,

UNITED STATES OF AMERICA,

Amicus Curiae.

No. 74-2633.

United States Court of Appeals,
Fifth Circuit.

June 27, 1975.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is denied and the Court having been polled at the request of one of the members of the

Opinion dated June 27, 1975

Court and a majority of the Circuit Judges who are in regular active service and not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also denied.

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.

GOLDBERG, Circuit Judge, with whom BROWN, Chief Judge and WISDOM and THORNBERRY, Circuit Judges, join (dissenting):

I respectfully dissent from the order denying the petition for rehearing and petition for rehearing en banc, for the reason stated in my dissenting opinion. 511 F.2d 1374.

SUPREME COURT, U. S.
FILED
NOV 12 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-476

ARLAM CARR, JR., *et al.*,

and

PENELOPE ANNE JENKINS, *et al.*,

Petitioners,

vs.

MONTGOMERY COUNTY BOARD OF EDUCATION, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

Introduction

In their Brief in Opposition[1] the respondents argue, in essence, that this Court should not grant a writ of certiorari herein for the following reasons:

1. The Board has continually acted in good faith in attempting to meet its responsibility to desegregate;

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[1] References to the Brief in Opposition will be noted as (Res. Br. —).

2. The trial judge was correct in finding that the remaining all-black schools were not vestiges of the dual system;

3. Plans submitted by petitioners for achieving greater desegregation of the remaining one-race schools were impractical and designed with impermissible goals in mind ("racial balance"); and that

4. The Board's plan achieves meaningful desegregation in a fashion that does not unduly burden blacks.

Point two above has been dealt with at length in our brief in chief which establishes, we submit, that the remaining all-black elementaries have been all-black since a state-imposed dual system was sanctioned by law in Montgomery County.[2] We would like to take this additional opportunity, however, to address points one, three and four in order to correct certain material misstatements and inaccuracies in the Brief in Opposition.

Argument

Petitioners do not seek to quarrel here over the question of whether the Montgomery County Board of Education has acted in good faith in carrying out its constitutional duty to dismantle its dual system of segregated schools. For "good faith" is simply not at issue in this litigation or in any school desegregation case, for that matter. The central issue turns, rather, upon the answers to factual questions, as ths Court has pointed out so often: Is the desegregation plan under consideration one "that promises realistically to work *now*?" *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 439 (1968); does the plan "achieve the greatest possible degree of actual de-

[2] Petition for a Writ of Certiorari at 12-21.

segregation?" *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971).

As the most recent enrollment statistics for the 1975-76 academic year in Montgomery County reflect, the answers to both the foregoing questions must be in the negative.[3] According to this report, 35,211 students are enrolled in the Montgomery County system for the current academic year, of which 17,029 are black and 18,182 are white. Out of the total black enrollment, 8484 are attending elementary schools. And of this number, 5011 or 59% are enrolled in facilities that are 85% or more black. The following chart indicates with more specificity the schools and black ratios which vividly attest to the continuing dual nature of elementary education in Montgomery County:

School	*Black Enrollment*	*White Enrollment*	*% Black*
Bellinger Hill	188	34	85
Booker Washington	234	3	99
Carver	393	9	98
Daisy Lawrence	363	5	99
Davis	678	47	94
Dunbar	296	38	89
Fews	643	1	99.9
Hayneville Road	713	22	97
Loveless	823	1	99.9
Paterson	516	21	97
Pintlala	164	13	93
Totals[4]	5011	193	

[3] A copy of the Board's "Report to the Court" of September 24, 1975 is attached hereto as an appendix for the Court's benefit.

[4] This total does not include elementary students attending Bellingrath which serves junior high school students as well since no breakdown by grade is given in the Report. The total black-white enrollment is 858 black and 232 white.

Plans submitted by petitioners were deficient, the Board asserts, first, because they relied upon non-contiguous pairing and clustering and rezoning to achieve greater desegregation and, secondly because they were designed with an eye to achieving an impermissible racial balance among schools in the system. Non-contiguous pairing and clustering have been sanctioned by this Court as viable tools for achieving a unitary school system. *Swann, supra.* The fact that a system must alter grade structures in its schools from the traditional 1-6, 7-9, 10-12 arrangement to accommodate desegregation in this fashion is of no constitutional moment. Moreover, the Board undoubtedly intends in its brief to leave the false impression, as did the trial court in its opinion, that petitioners' plans involved travel times and distances far out of line with transportation of students prior to 1974 and under its own "desegregation plan". The facts are otherwise. Under the plan approved by the district court in 1970, a significant number of students transported lived in so-called "periphery zones" in rural Montgomery County and were bused to schools in the City. During the 1973-74 academic year, the longest one-way bus-trip was 46 miles and a number of trips exceeded 30 miles one way. Most of the children bused under this arrangement traveled more than 10 miles one way; and the shortest distance any child traveled was 6 miles one way. Under the plan approved by the district court currently in force some black children are bused distances of nine and twelve miles each way.

In contrast, petitioners' plans envisioned transportation times and distances often far below those previously or presently approved by the Board and district court. It must be remembered that of those all-black schools listed in the chart at page 3 *supra*, only Dunbar and Pintlala are located outside of the City of Montgomery. The City

of Montgomery at its furthest extremities is about 12 miles from west to east and 10 miles from north to south. Movement from point-to-point in any direction within the city limits is facilitated by the existence of two major freeways. It has no major natural or man-made obstacles to transportation within its limits. Given these facts, the following times and distances in petitioners' plans for desegregating the city elementary schools are not surprising:

1. Under the plan of petitioners Carr, et al., the longest distance and time between paired schools would have been 10 miles and 30 minutes, involving two schools at the extreme opposite ends of the City. Other pairings would have required less travel;

2. Under the plans of petitioners Jenkins, et al. the longest route within the city would have been 7.3 miles and 18 minutes. And, if certain satellite zone features of the plans had been discarded (an option available to the trial court), routes would have rarely exceeded 5 miles. The average travel distance under these plans would have been 4-5 miles.

In light of these figures the Board's reliance upon *Northcross* v. *Board of Education of Memphis*, 489 F.2d 15 (6th Cir. 1973), *cert. denied*, 416 U.S. 962 (1974) seems ill-founded. There the lower courts rejected as unreasonable a plan that would have transported students between 46-60 minutes one way. As in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), where this Court approved student transportation averaging about seven miles and taking not over 35 minutes, *Id.* at 30, transportation times and distances in petitioners' plans fell well within the bounds of previous busing arrangements and often fell below the Board's projections under its own plan. The Board has, nevertheless, joined the trial court in ig-

noring this Court's directive in *Swann* to evaluate transportation plans in terms of whether "the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the education process." The district court's bald assertion that pairings and clusterings "would substantially increase the time and distance that students would have to travel" [5] and emphasis upon the number of students to be transported under the respective plans, which the Board echoes in its brief,[6] are plainly attempts to avoid the facts vindicating petitioners' position.

It is also suggested by the Board that petitioners' plans were constitutionally defective because they sought to achieve racial balance to the detriment of all other reasonable considerations. In actuality, petitioners' plans did no more than rely upon this Court's approval in *Swann, supra* of the use of system-wide ratios as starting points in any reasonable attempt to desegregate a dual system. Racial balance was not the objective of nor was it the result achieved by petitioners' plans. In the City of Montgomery, racial ratios under the plan of petitioners Carr, et al. ranged from 24% black to 66% black. And under the plans of petitioners Jenkins, et al. black percentages were 84% to 27% black and 100% to 7% black respectively. The Board's brief itself establishes that the "racial balance" charge leveled at petitioners' plans is spurious by acknowledging that some all-black schools and racially-identifiable schools were left under all submissions.[7] Hence, on yet another issue, the district court and Board have characterized petitioners' plans in a fashion at odds with the factual record.

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[5] Appendix to Petition p. 16a-17a.
[6] Res. Br. 30.
[7] Res. Br. 36, 40, 47.

The Board has also attempted to convey the impression that its desegregated plan does not impose undue burden upon blacks nor transport blacks disproportionately. It does so by pointing out that "2401 white children [are] transported to schools which are predominantly black or would be predominantly black without the white transportation involved," [8] that several formerly all black schools will become predominantly white," [9] and that "no white child is transported past a majority black school to a majority white school." [10] We would respectfully submit that the Board's references are entirely to transportation or assignment of white junior high or senior high students. It remains true, nevertheless, that no white elementary child is bused to increase desegregation and that whites bused as part of the plan are sent to majority white schools, often by-passing closer majority black schools in transit.[11] The Board plan, in fact, envisioned a decrease in elementary school transportation. In 1973-74, the Board transported 5,388 elementary students of which 3,177 or 59% were black. Under the plan presently in effect, 4,465 elementary students were to be transported, of which 3,157 or 71% were to be black. As a result, *903* fewer white students and only 2 fewer black students were to be bused in 1974-75 as compared to 1973-74 figures.[12] That the transportation of

[8] Res. Br. 19.

[9] Res. Br. 22.

[10] *Id.*

[11] For example, 130 black children and 14 white children who previously attended Chilton, a school closed under the Board's plan, are being transported four and five miles to Head Elementary and Dalraida Elementary, majority-white schools even though Bellinger Hill, Booker Washington, Fews, Loveless and Daisy Lawrence are within walking distance of the Chilton zone.

[12] Much of the reduction in white elementary student transportation can be attributed to the construction of two new elementaries, Vaughn Road and Eastern By-Pass (now Dozier), at the eastern edge of Montgomery City.

solely blacks for purposes of elementary desegregation was a consequence of the Board's concern for "white flight" was not, contrary to the assertion in its brief, a rationale of petitioners' creation. The testimony quoted below of Mr. Silas Garrett, Superintendent of Schools for the Montgomery system, on this point is dispositive, we submit:

> The Court: His question is why doesn't the Board propose to transport white students to predominantly black [elementary] schools? He says under your plan, there is [sic] no instances where you do that.
>
> Witness: Oh.
>
> The Court: Is there a reason? That is his question.
>
> Witness: Yes, sir: Our reason is this; that we do not believe that white children so assigned would attend in any substantial numbers. And, here again, it would, in our opinion, be an operation in futility, and it would not further the overall desegregation of this school system.[13]

In order to avoid potential white flight, therefore, the Board's plan was designed such that only one elementary school out of 33 was projected to be between 40-60% white; twenty schools were projected to be between 60-80% and eleven schools were projected to be between 0-19% white. The pattern is one of arranging for the maintenance of 60% or better white schools or virtually all-black schools. In sum, the Board, not petitioners, was concerned about "racial balance"—to avoid anticipated white flight—in structuring its plan.[14]

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[13] Tr. p. 240 (April 24, 1974 hearing). Similar testimony occurs at Tr. pp. 251-52 with respect to the potential for "a white exodus."

[14] Cf. *Brewer* v. *School Board of City of Norfolk*, 434 F.2d 408, 411 (4th Cir. 1970) *cert. denied*, 399 U.S. 929 (1970).

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that a writ of certiorari should be granted in this cause.

Respectfully submitted,

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EXHIBIT "A"

MONTGOMERY PUBLIC SCHOOLS
Montgomery, Alabama

A REPORT TO THE FEDERAL COURT
September 15, 1975

SCHOOL	NORMAL CAPACITY	ACTUAL ENROLLMENT BLACK	ACTUAL ENROLLMENT WHITE	NO. FACULTY BLACK	NO. FACULTY WHITE
Baldwin	780	457	54	11	17
Bear	630	183	346	9	14
Bellinger Hill	300	188	34	5	6
Bellingrath	1,230*	858	232	17	26
Booker Washington	420	234	3	6	6
Capitol Heights Ele.	570	128	191	6	8
Capitol Heights Jr.	1,200	314	662	17	23
Carver Ele.	780	393	9	8	9
Carver Jr.	660	350	547	16	18
Carver Sr.	1,100**	773	645	24	41
Catoma	240	52	125	3	4
Chisholm	810	331	478	15	19
Cloverdale	1,170	445	832	17	30
Crump	990	219	775	16	22
Daisy Lawrence	720	363	5	8	9
Dalraida	630	116	389	9	13
Dannelly	780	220	495	11	17
Davis	630	678	47	14	17
Dozier	750	120	712	15	17
Dunbar	660	296	38	8	9
Fews	720	643	1	14	15
Flowers	780	150	522	11	16
Floyd	1,350*	416	695	16	27
Forest Avenue	480	120	248	8	10
Georgia Washington	1,290	428	1,010	21	34
Goodwyn	1,500	586	902	22	32
Harrison	750	283	393	13	16
Hayneville Road	1,200	713	22	13	18
Head	690	107	481	10	15
Highland Avenue	390	106	211	5	9
Highland Gardens	1,020	287	485	15	18
Houston Hill Jr.	570	263	350	10	16
Jefferson Davis	2,100	832	1,486	37	62
Johnson	660	123	484	9	16
Lanier	2,250	737	739	23	46
Lee	2,300	889	1,610	36	73
Loveless	1,140	823	1	16	20
MacMillan	390	205	69	6	7
McIntyre	1,500	802	20	15	16
Montgomery Co. High	570	392	55	8	17
Morningview	600	99	445	10	14
Paterson	810	516	21	11	14
Peterson	600	119	329	8	11
Pintlala	270	164	13	3	5
Southlawn	840	314	375	13	14
Vaughn Road	750	194	608	14	19

*Combined elementary and junior high
**Six rooms not needed in the elementary program are used by the senior high school

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